SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 71

LUIS ALVARO CEBALLOS (Y ARBOLEDA),
PETITIONER,

vs.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE AT THE PORT OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

LUIS ALVARO CEBALLOS (Y ARBOLEDA)

vs.

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization Service at the Port of New York

DOCKET ENTRIES

Basis of Action: To set aside order of deportation

(Violation 5th Amendment to U. S. Constitution, etc.)

* * *

Date	*Filings—Proceedings*

Mar. 18-55. Filed Complaint and Issued Summons.

Mar. 23-55. Filed summons and return, served deft. 3-21-55.

Mar. 18-55. Filed affidavit and notice of motion to enjoin deportation pending determination—ret. 3-29-55.

Mar. 29-55. Filed affidavit and notice of motion to dismiss—ret. 3-31-55.

Apr. 15-55. Filed Opinion No. 21,843 and judgment. Motion to dismiss granted—So ordered—I. R. Kaufman, J.—Mailed notice of entry 4-15-55.

Apr. 20-55. Filed judgment dismissing complaint—I. R. Kaufman, J.—Mailed notice of entry 4-21-55.

Apr. 20-55. Filed plaintiff's notice of appeal—Mailed copy to U. S. Atty. 4-21-55.

Apr. 21-55. Filed affidavit and notice of motion to stay deportation pending determination of appeal—ret. 4-26-55.

Apr. 26-55. Memo endorsed on motion filed 4-21-55—Consented to—Settle order—Weinfeld, J.

Apr. 27-55. Filed consent and order staying deportation pending determination of appeal—Weinfeld, J.—Mailed notice of entry 4-28-55.

May 27-55. Filed stip. and order extending time to file appeal record to 7-6-55—Dawson, J.

[fol. 2] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

LUIS ALVARO CEBALLOS (Y ARBOLEDA), Plaintiff,

against

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization Service at the Port of New York, Defendant.

COMPLAINT—FILED MARCH 18, 1955

The plaintiff by his attorneys, Blanch Freedman & Gloria Agrin, complaining of the defendant alleges:

1. This complaint is filed pursuant to the provisions of Section 1009 of Title 5 of the U. S. C. A. and Section 1329 of Title 8, U. S. C. A.

2. The defendant is the District Director of the Third District of the Immigration and Naturalization Service at the Port of New York, which embraces the judicial district of the Southern District of New York, and as such he is the agent and representative, in the said immigration district, of the Attorney General of the United States and the Commissioner of Immigration and Naturalization, and is the highest official in charge of the said Service in the said immigration district.

[fol. 3] 3. The defendant is duly authorized and duly delegated in his said official capacity to administer and carry into effect, in the said immigration district, the provisions of the immigration laws, and more (2) particularly § 19(c)(2) of the Immigration Act of 1917, as amended, formerly 8 U. S. C. A. § 155(c), and the rules and regulations promulgated thereunder and to effectuate, in said third district, orders of deportation.

4. The plaintiff, an alien 41 years of age, was born in Colombia, South America. He is married to a native born United States citizen, has two citizen children with whom he

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* All figures in parentheses indicate the number of each new page of the paper filed in this Court as part of the Record on Appeal.

lives and all of whom are completely dependent upon him for their support, maintenance and care.

5. Plaintiff first entered the United States on February 24th, 1942 and last entered the United States on April 2, 1951. He has resided here continuously since said last entry.

6. On April 23, 1951, plaintiff was served with a warrant of arrest for deportation, issued by the defendant herein, charging him with being in the United States in violation of the Immigration Act of 1924 in that after his admission into the United States on a transit visa he failed to maintain said transit status.

7. Thereafter, in 1951, plaintiff made timely application for suspension of deportation pursuant to the provisions of § 19(c) of the Immigration Act of 1917 as amended (formerly 8 U. S. C. A. 155 (c)), on the ground that his deportation would result in a serious economic detriment to his citizen wife and citizen minor children.

8. Hearings on the warrant charge and on the application for suspension of deportation were held pursuant to [fol. 4] Title 8 of the Code of Federal Regulations 1951 Supplement, part 151.

(3) 9. On January 25, 1954, plaintiff's application for suspension of deportation was denied on the sole ground that he was statutorily ineligible therefor and his deportation was ordered on the charge set forth in the warrant of arrest.

10. Plaintiff, thereupon appealed from the aforesaid order to the Board of Immigration Appeals; said appeal was dismissed by the Board on October 19, 1954 and plaintiff's motion to reconsider was denied by the Board on February 17, 1955.

11. That the aforesaid order of January 25, 1954 is a final order in an administrative proceeding: a deportation proceeding by an administrative agency, to wit, the Immigration and Naturalization Service and the same is an order to be effectuated by the defendant herein.

12. By letter dated March 9, 1955 defendant ordered plaintiff to depart from the United States on or before April 11, 1955.

13. Upon information and belief, upon his failure to so

depart the defendant will take plaintiff into custody on a warrant of arrest for deportation based upon defendant's aforesaid order of January 25, 1954, and plaintiff will be deported.

14. The aforesaid order of January 25, 1954 is illegal; the finding therein that plaintiff is statutorily ineligible for suspension of deportation under Section 19(c) of the Act of 1917 in that he is ineligible for citizenship under Section 3(a) of the Selective Service Act (4) of 1940, is contrary to law; Section 3(a) of the Selective Service Act of 1940 [fol. 5] as here construed and applied is unauthorized by said law and is in conflict with judicial interpretation thereof; the said holding of plaintiff statutorily ineligible for suspension of deportation as aforesaid, unlawfully deprived plaintiff of his rights and privileges under the statute and unlawfully prevented any exercise by the Attorney General of his discretion in considering and determining plaintiff's application for suspension of deportation.

15. The said order of deportation is void, illegal and unlawful in that (1) the deportation hearings and procedures had therein on which the said order is based did not comport with the minimum standards for a fair and impartial hearing, denying to plaintiff due process of law, contrary to and in violation of the Fifth Amendment to the Constitution of the United States; and (2) the said hearings and deportation procedures on which said order is based did not comply with the provisions of the Administrative Procedure Act of 1946 or the conditions established by law essential to a fair hearing by an administrative agency.

Wherefore, plaintiff asks the judgment of this Court that:

1. A declaratory judgment be made and entered declaring:

a) plaintiff is not barred from United States citizenship under Section 3(a) of the Selective Service Act of 1940.

b) plaintiff is statutorily eligible under Section 19 (c) of the Immigration Act of 1917, as amended (formerly 8 U. S. C. A. 155) for suspension of deportation.

c) the order of January 25, 1924 to be unlawful.

2. An order be made and entered herein setting aside the order of January 25, 1954, the findings and conclusions therein contained as arbitrary and not in accordance with law.

[fol. 6] 3. An order be made and entered herein directing the defendant to process, consonant with law and in (5) accordance with the mandate of this Court, plaintiff's application for suspension of deportation.

4. An order be made and entered enjoining and restraining the defendant from deporting, executing or taking any other action in pursuance or by virtue of the order herein dated January 25, 1954.

5. For such other and further relief as to this Court may deem just and proper in the premises.

Pending the hearing and determination of this action, plaintiff prays for the issuance of an order enjoining and restraining the defendant from deporting plaintiff or otherwise proceeding with his deportation under said order of January 25, 1954 and for such other necessary and appropriate relief as may be required to preserve the status or rights of the parties hereto pending the conclusion of this action.

Dated: New York, N. Y., March 18, 1955.

Blanch Freedman & Gloria Agrin, Attorneys for Plaintiff, Office & P. O. Address, 220 Broadway, New York, N. Y.

[fol. 7] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PLAINTIFF'S NOTICE OF MOTION FOR TEMPORARY INJUNCTION—FILED MARCH 18, 1955

Sir:

Please take notice that upon the annexed affidavit of Luis Alvara Ceballos, plaintiff above named, duly verified the 18th day of March 1955, and upon the complaint filed herein, a copy of which is hereto attached and upon all the

proceedings heretofore had herein before the Immigration and Naturalization Service, the undersigned will move this Court at a motion term thereof, to be held in the United States Court House at Foley Square, New York, N. Y. in Room 506 thereof on March 29th, 1955, at 10:00 A.M. on that date, or as soon thereafter as counsel can be heard, for an order enjoining and restraining the defendant, pending the hearing and determination of the suit herein, from deporting plaintiff or otherwise proceeding with his deportation under the order of deportation herein dated January 25, 1954, and for such other necessary and appropriate relief as may be required to preserve the status or rights of the parties hereto pending the conclusion of said suit.

Dated: New York, N. Y., March 18th, 1955.

Yours, etc., Blanch Freedman & Gloria Agrin, Attorneys for Plaintiff, Office & P. O. Address: 220 Broadway, New York, N. Y.

[fol. 8] PLAINTIFF'S AFFIDAVIT IN SUPPORT OF MOTION FOR TEMPORARY INJUNCTION

[Title omitted]

STATE OF NEW YORK,
County of New York, ss.:

LUIS ALVARO CEBALLOS being fully sworn deposes and says:

I am the plaintiff in the above entitled action and am the subject of a final order of deportation. I submit this affidavit in support of the annexed notice of motion for an order enjoining and restraining the defendant herein from deporting me, pending the determination of this suit.

The action herein is brought pursuant to 5 U. S. C. A. § 1009 and 8 U. S. C. A. § 1329 and challenges the legality of the said order of deportation against me. Judgment is asked (1) declaring that under Section 3(a) of the Selective Service Act of 1940 I am not barred from United States citizenship; that under Section 19(c) of the 1917 Immigra-

tion Act, as amended, I am statutorily eligible for suspension of deportation; and that the order of deportation [fol. 9] against me is unlawful; (2) setting aside the deportation order; (3) directing defendant (8) to process my application for suspension in accordance with law and (4) enjoining and restraining defendant from deporting me under the said order of deportation against me.

The defendant has advised me by letter (a photostatic copy of which is attached hereto and marked Exhibit A), that I must depart from the United States by April 11, 1955. I have further been advised and verily believe that upon my failure to so depart, the defendant in pursuance of the order of deportation herein will cause me to be apprehended and deported. Unless such action is stayed by this Court, this action with the rights dependent thereon will be mooted and I and my family will suffer irreparable injury and be deprived of the inestimable right and privilege to live in the United States. On the other hand, as will be seen from the facts in the case, the granting of the stay herein pending the conclusion of my suit in no way affects adversely the defendant; it neither impairs any interests of the United States Government, nor does it impose upon it any undue inconvenience.

I am now 42 years of age; I was born in Colombia, South America and I am a subject of that country. I am married to an American born citizen wife and am the father of two native born children aged 3½ and 1¾ years. I live with my wife and children in a home of our own at 15 Crestwood Lane, New Rochelle, New York. I am the president of Ceballos Bros., Inc., an export-import business with offices at 150 Broadway, New York, N. Y. (9) My wife and children are completely dependent upon me for support and maintenance.

I last entered the United States with my wife, by plane on April 2, 1952, on a transit visa, enroute to Mexico. In the interim, my wife, who was pregnant, became extremely ill; her health forbade traveling and she wanted to remain [fol. 10] in the United States, her native homeland. We have lived here ever since.

On or about April 23, 1951, I voluntarily went to the office of the defendant, the Immigration and Naturalization

Service at 70 Columbus Avenue, New York, N. Y., to adjust my status in the United States under the immigration law (former Section 155 of 8 U. S. C. A.). A warrant of arrest for deportation issued on the charge of my having failed to maintain my transit status. I thereupon made application for suspension of deportation. Hearings were held and on January 25, 1954 the hearing officer found me deportable as charged and denied my application for suspension:

> "The bar to his being granted Suspension of Deportation or Pre-examination so that he could obtain a visa is the fact that he, on August 26, 1943, signed DSS form 301, 'Application by Alien for Relief from Military Service.'"

The Board of Immigration Appeals dismissed my appeal from the Hearing Officer's order on October 19, 1954. My motion to the Board to reconsider was denied February 17, 1955.

The facts concerning my eligibility for suspension are as follows. I had been lawfully admitted to the United States for permanent residence on February (10) 24th, 1942. It was the time of World War II and within three months of my admission I duly registered with the Local Draft Board, No. 40, in New York City as required by the Selective Service Act. I executed questionnaire designated DSS Form 40. Thereafter, in the same year—1942—I appeared in person at the Local Board on two occasions: first, to file a change of residence and thereafter in July 1942 to report the loss of my registration card and apply for a duplicate. (I had not as yet been classified or examined.) On the latter occasion I discussed with the Board the feasibility of my being [fol. 11] placed in a Colombian or other Latin American Group, that I heard the United States Army was in the process of organizing. The Local Board advised me that my preference would be considered and in due time I would hear from them.

However, I did not hear from the Local Board until almost a year later. In June 1943 I received in the mail from the Local Board two sets of forms: DSS 304 "Alien's Personal History and Statement" and DSS 302 "Application for Determination of Residence."

I took the forms to my Local Draft Board and in connection with the execution of Form 304 I again discussed the possibility of getting into the Colombian Group. I was thereupon advised to insert the word *"do"* in item No. 41 of form 304 which made the printed item read:

> "I *do* [written in] object to service in the land and naval forces of the United States."

This was represented to me to be the mechanics employed to give consideration to my request for assignment to a Latin American or Colombian Group in the United States Armed (11) Forces. Whether I would be so assigned was a matter to be determined by the Selective Service authorities, of which they said I would be notified.

In connection with item No. 41, above mentioned, there appeared the following notice:

> " * * * If you are a citizen or subject of a neutral country and you do not wish to serve in the land or naval forces of the United States, *you may apply to your Local Board for an application* by alien *for relief from military service.* (Form 301) which, when executed by you and filed by the Local Board, will relieve you from the obligation to serve in the land and naval forces in the United States, but will also debar you from thereafter becoming a citizen of the United States." (Emphasis added.)

[fol. 12] I did not then or at any other time apply for or request such a form.

Two months later, August 1943, I received in the mail from my Local Board, unsolicited by me, a set of forms that were completely filled out—presumably by the Board—with instructions to sign and return to them. This was the same DSS form 301 "Application for Relief from Military Service."

I took the forms to my Local Board and after discussion with them, I was instructed to sign the form as prepared by the Board in order to have my request to be assigned if possible to a Colombian Group. I thereupon signed the form and returned home to await notification as to my specific service assignment in the U. S. Army.

I did not know then, nor did I know for many years thereafter, that the form 301 I had signed was an application to be relieved from military service. (12) The fact is that I was never classified 4C (the classification of relief from service based on form DSS 301). On the contrary, I was classified 1A and in January 1944 instructed by my Local Board to appear for induction. I did appear as directed and after physical examination was rejected because of a chronic kidney ailment (nephritis) and reclassified 4F.

I never sought nor wanted relief from military service and in truth was never so relieved. In the first place, I never knew myself to be or considered myself in 1943 to be a neutral alien. I was a citizen of Colombia and knew from my own knowledge and experience that Colombia was actively engaged in the allied cause from the moment Pearl Harbor occurred. Colombia broke off relations with Japan on December 8, 1941; with Germany and Italy on December 9, 1941; with Vichy France, November 26, 1942 (see World Almanac, 1949 Edition, p. 322). In the second place, I never applied or asked for form 301. Sent to me as it was—unsolicited and fully filled out—there was nothing to alert me [fol. 13] that it would serve a purpose other than had been represented to me by the Board: to consider an assignment for me in a Latin Group within the United States Army.

I have since learned, through an examination of my Selective Service Record on file in New York City, that the form 301 was sent to me because of a confusion that existed in the Local Board's mind as to my status. This is revealed by two letters contained in my file dated (1) June 19, 1943 from Local Board 40 to Selective Service Headquarters in Washington, D. C., and (2) letter dated July 28, 1943 from Selective Service Headquarters to Local (13) Board 40.

The sequence of events is as follows:

On June 16, 1943 I filled out forms 302 and 304 (see supra, p. 4).

On June 19, 1943 my Local Board sent my file to Selective Service Headquarters in Washington, D. C. with the request that they determine my status and inductibility.

On July 28, 1943 the Selective Service Headquarters in

Washington, D. C. returned my file to my Local Board with an answering letter as follows:

> "Review of the file discloses that the registrant is a citizen of Colombia, South America and a non-declarant alien. He entered the United States on February 24, 1942 and filed his questionnaire on May 28, 1942. D.S.S. Form 302 was filed on June 16, 1943, but cannot be processed since it was not filed within 3 months of alien's entry into the United States or, in the alternative, within 3 months of the date on which he became liable for service.
>
> "It is our opinion that the registrant should be considered 'a male person residing in the United States' and processed accordingly.
>
> [fol. 14] "We note from the alien's personal history and statement (D.S.S. Form 304) that the registrant states he objects to service in U.S. armed forces. We point out therefore, that as a citizen of Colombia, which is a neutral country, the registrant may file a D.S.S. Form 301 at any time prior to his induction."
>
> Signed, A. Kaufman
> Major, Infantry Chief Maintenance
> & Operations
> For the New York City Director

Instead of processing me as directed by headquarters as "a male person residing in the United States" and classifying me accordingly, they took it upon themselves to send me Form 301, which I signed, as stated above, in the belief that it was to serve to facilitate an assignment (Latin Group) for service in the U. S. Army and not for relief from service.

In the third place, I was never exempted from training and service. I was never classified 4C as a result of having signed Form 301. I remained fully subject to training and service and was not relieved of service.

Under these circumstances, I submit the signing of Form 301 cannot be held to forever debar me from United States citizenship and the order of deportation and finding that I am statutorily ineligible for suspension of deportation is

incorrect. The issue before this Court is a substantial one of extraordinary consequence to me and my citizen family.

Wherefore, I respectfully pray that this motion for a stay of deportation pending the determination of the action herein be granted—for all of which no previous relief has heretofore been granted.

(S) Luis Alvaro Ceballos

(Sworn to by plaintiff on March 18, 1955.)

[fol. 15] EXHIBIT A, ANNEXED TO FOREGOING AFFIDAVIT OF PLAINTIFF

UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service
70 Columbus Avenue, New York 23, New York
March 9, 1955

Please refer to this
File No.: A7 662 411 DDPB

Mr. Luis Alvaro Ceballos Arboleda
3725 Henry Hudson Parkway
New York, New York

Dear Sir:

Reference is made to your immigration proceedings pending before this Service and recent request for an extension of time within which to depart voluntarily from the United States.

You are hereby informed you will be granted an extension of thirty days from date of notification or until April 11, 1955 within which to depart from the United States voluntarily at your own expense, conditioned upon arrangements being made with this office for verification of your departure.

You are requested to inform this office at least five days in advance the date, port and manner in which you intend to leave the United States, so that your departure may be

witnessed by an officer of this Service and your case closed. In the event there is a delivery bond outstanding in your case, you are warned that to expedite cancellation of this bond you must inform this office in advance of the facts of your departure. You are further warned that you may experience difficulty and delay if you leave the United States without your security and try to repossess or convert it abroad.

[fol. 16] Please be advised on your motion for reconsideration the Board of Immigration Appeals on February 17, 1955 ordered that motion for reconsideration be and the same is hereby denied.

Very truly yours, Edw. J. Shaughnessy, District Director, New York District, by: A. J. Salturelli, A. J. Salturelli, Chief Parole Section.

cc: Blanch Freedman, Esquire, 220 Broadway, New York, New York.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

DEFENDANT'S NOTICE OF MOTION TO DISMISS COMPLAINT—FILED MARCH 29, 1955

MESDAMES:

Please take notice that upon the annexed affidavit of Lester Friedman, Esq., duly verified, and upon the record of the administrative proceedings had herein, the undersigned, as attorney for the defendant will move this Court [fol. 17] at a term for the hearing of motions at the United States Court House, Foley Square, New York, N. Y., Room 506, on March 31, 1954 at 10 a.m. on that date or as soon thereafter as counsel can be heard for an order dismissing the complaint herein pursuant to Rule 12 F.R.C.P., on the grounds that the defendant is not a proper party hereto, that an indispensable party has not been named herein, that the form of remedy is not appropriate for the relief

sought and for failure to state a claim upon which relief may be granted.

Yours, etc., J. Edward Lumbard, United States Attorney for the Southern District of New York, Attorney for Defendant.

To: Blanch Freedman & Gloria Agrin, Esqs., Attorneys for Plaintiff, 220 Broadway, New York, N. Y.

[fol. 18] AFFIDAVIT OF LESTER FRIEDMAN IN SUPPORT OF MOTION TO DISMISS COMPLAINT

[Title omitted]

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss.:

LESTER FRIEDMAN, being duly sworn deposes and says, that he is an attorney in the office of the District Counsel, Immigration and Naturalization Service, Department of Justice and, as such, is familiar with the administrative proceedings heretofore had herein.

There is incorporated herein by reference the administrative record of the deportation proceedings which plaintiff seeks to review. The said record will be handed up to this Court as an exhibit at the time of argument. The said record contains the complete administrative proceedings which culminated in a finding that plaintiff is subject to deportation but may be permitted to depart voluntarily in lieu of deportation provided he departs from the United States on or before April 11, 1955. The said record also contains the decision of the Board of Immigration Appeals dated October 19, 1954, wherein a final finding of deport-
[fol. 19] ability was made, and which discusses at length the various factual questions and legal issues involved in the case. For this reason, the facts will not be recited herein at length.

(26) Briefly plaintiff came to the United States as an alien in transit to another country and was admitted tem-

porarily for that purpose. He failed to depart and deportation proceedings were instituted on April 23, 1951. He was accorded several hearings in the course of which he conceded deportability but made application for the discretionary privilege of suspension of deportation under 8 U. S. C. 155(c).

The only issue which was raised in the administrative proceedings was the problem of whether plaintiff was eligible for the relief for which he applied. The issue arose because plaintiff had been residing in the United States as a resident during World War II and he then filed a questionnaire with his local Draft Board wherein he stated that he did not wish to serve in the Armed Forces. He thereafter executed a formal application to be relieved from service as a neutral alien. Such application, under the usual circumstances would have the legal effect of barring the applicant from naturalization under Section 3(a) of the Selective Service Act of 1940. Needless to say, plaintiff had the burden of establishing his statutory eligibility for suspension of deportation, one of the statutory requisites being eligibility to citizenship.

Plaintiff attempted to establish extenuating and unusual circumstances which, if believed, would afford him some basis for claiming that his application for exemption was based upon a misunderstanding and therefore not binding upon him. However, as pointed out by the Board of Immigration Appeals his explanation was not believed. His testimony contained numerous discrepancies including a false (27) statement that he had at one time made denying that he even executed such an application. In addition his testimony was inherently improbable, if not fantastic. [fol. 20] Thus, on the basis of the evidence of record the Board decided the question of credibility adversely to the plaintiff and ruled that he was bound by his voluntary execution of an application for exemption from military service.

Notwithstanding the denial of suspension of deportation to plaintiff, he was granted a lesser form of discretionary relief, that is voluntary departure in lieu of deportation, for which the requisite of eligibility to citizenship is not contained in the statute.

The first ground for the dismissal of the complaint herein, as urged by the defendant, is that the defendant is not a proper party. In this connection it should be noted that the District Director did not make any of the adjudications which are now sought to be reviewed. Nor did the said District Director make the final order of deportation dated October 19, 1954; the latter decision was made by the Board of Immigration Appeals acting for the Attorney General of the United States. What is most important is that the plaintiff has not been ordered deported; he has been granted voluntary departure in lieu of deportation. Thus the District Director has neither issued a warrant for plaintiff's deportation nor is he now threatening to execute such a warrant. It is therefore apparent that no justiciable controversy exists between the plaintiff and the defendant. Although the Hearing Officer in this case was subject to certain administrative supervision by the (28) defendant he was not and is not subject to his direction or control with respect to the decision which was made. As a matter of fact, the District Director has the same right to appeal if he disagrees with a Hearing Officer's decision as has the alien involved.

In view of the foregoing we respectfully submit that only the Attorney General of the United States for whom the Board of Immigration Appeals acted is a proper party hereto and that the Attorney General is an indispensable party. Nor can the complaint herein be amended to in-
[fol. 21] clude the Attorney General since this Court has no jurisdiction over the said official whose official residence is Washington, D. C. We respectfully submit that the case of Vaz v. Shaughnessy, 208 F. 2d 70, is dispositive of the question of parties. Although the Court of Appeals in this Circuit reached a contrary conclusion in the recent case of Pedreiro v. Shaughnessy, 213 F. 2d 768, the latter case distinguished the Vaz case and did not overrule it. The instant case is amazingly parallel to the Vaz case; both involve issues of discretionary relief from deportation which are vested by statute within the power of the Attorney General to grant or deny. Another distinguishing feature between the Pedreiro case and this case is the fact that Pedreiro was about to be deported by the District Director

and such deportation was sought to be enjoined. Here the alien has not been ordered deported and no action is now contemplated by the District Director, unless plaintiff fails to depart voluntarily, a question which has not yet arisen and may never arise. (29) In any event certiorari has been granted by the United States Supreme Court in the Pedreiro case both on the question of proper parties as well as the form of remedy which we will discuss below.

The next ground urged by defendant for dismissing the complaint herein is that the form of remedy is not proper. In this connection we rely on the leading decision of the United States Supreme Court in *Heikkila* v. *Barber*, 345 U. S. 229. The theory of the latter case was that the Immigration law, prior to the effective date of the Immigration and Nationality Act, provided that the decision of the Attorney General shall be final. Here the proceedings were conducted and the orders made under the same Act which was construed in the Heikkila case. We accordingly submit that the conflict which has arisen between Circuits as to the form of remedy which is now authorized by the Immigration and Nationality Act is not an issue in this case (see Pedreiro v. Shaughnessy, cited above, cert. granted [fol. 22] and Batista v. Nicolls, 213 F. 2d 20, wholly to the contrary).

Notwithstanding the technical deficiencies in the complaint herein we would prefer a decision on the merits. This is an action for review of an administrative proceeding which is now before this Court. The principal issue, on the administrative level, was one of fact. As to this issue plaintiff submitted nothing but his self-serving declarations claiming extenuating circumstances under which he applied for exemption from military service. The administrative authorities declined to believe him and attached no credence to his testimony. We respectfully submit that this Court may not substitute its judgment for plaintiff's credibility for that vested by statute in the Executive branch of the (30) Government. Even in judicial proceedings "the mere say-so of interested witnesses does not have to be accepted" (*Flynn ex rel. Yee Suey* v. *Ward*, 104 F. 2d 900-902; see also *Lew Wah Fook* v. *Brownell*, C. A. 9, January 14, 1955, not yet reported).

The record herein amply demonstrates that the plaintiff was afforded a fair administrative hearing wherein substantial evidence supported the administrative findings and wherein no error of law was made. For this reason no basis for judicial intervention exists and no claim can be asserted by the plaintiff justifying judicial intercession.

WHEREFORE it is respectfully prayed that the complaint herein be dismissed on the merits, pursuant to Rule 12(b) F. R. C. P. and on the further grounds that the defendant is not a proper party, that an indispensable party has not been named and that the form of remedy is inappropriate.

Lester Friedman

(Sworn to by Lester Friedman on March 29, 1955.)

[fol. 23] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

LUIS ALVARO CEBALLOS (Y ARBOLEDA), Plaintiff,

against

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization Service at the Port of New York, Defendant.

OPINION OF KAUFMAN, D.J.—April 15, 1955

Appearances:

Blanch Freedman & Gloria Agrin, Attorneys for Plaintiff.

J. Edward Lumbard, United States Attorney for the Southern District of New York, Attorney for Defendant.

Harold J. Raby, Assistant United States Attorney.

Lester Friedman, Attorney, Immigration and Naturalization Service, of Counsel.

IRVING R. KAUFMAN, D.J.

This action has been brought pursuant to Section 10 of the Administrative Procedure Act, 5 U. S. C. Sec. 1009, and the general jurisdictional provision of the Immigration and Nationality Act of 1952, 8 U. S. C. Sec. 1329, to

[fol. 24] review the (32) administrative proceedings of the Immigration and Naturalization Service wherein plaintiff was found deportable but was permitted to depart voluntarily in lieu of deportation. The motion now before the Court is one by the defendant [1] to dismiss the complaint:

(1) for failure to state a claim;

(2) for failure to name an indispensable party—i.e. the Attorney General of the United States and/or the Commissioner; and

(3) for failure to pursue the proper form of remedy (contended to be habeas corpus).

Plaintiff a subject of Columbia, last entered the United States on April 2, 1951, on a temporary visa, en route to Mexico. He has remained here ever since. A warrant of arrest for his deportation issued on April 23, 1951 for his failure to maintain transit status. Thereupon, he applied for suspension of deportation. Hearings were held, and on January 25, 1954, the hearing officer found plaintiff to be deportable and denied his application for suspension of deportation on the ground that he was statutorily ineligible for such relief because of his voluntary execution of an application for exemption from military service under Section 3(a) of the Selecive Service Act of 1940. (33) On October 19, 1954, the Board of Immigration Appeals dismissed plaintiff's appeal from the hearing officer's order on the ground that plaintiff had voluntarily and knowingly executed the application for exemption from military service, and thus was statutorily ineligible for suspension of de-[fol. 25] portation. This action against the District Director was instituted shortly after the Board's denial of plaintiff's request for reconsideration on February 17, 1955.

The primary attack of the plaintiff in this action is upon the finding that he is statutorily ineligible for the discretionary relief of suspension of deportation. The relief

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[1] The plaintiff moved before this Court for an order restraining the defendant from deporting him pending the determination of this motion. Upon the representation of counsel for the defendant that no action against the plaintiff would be taken, the plaintiff withdrew the application.

requested in the complaint is a judgment declaring the plaintiff to be statutorily eligible for suspension of deportation, an order setting aside, and restraining the defendant from executing, the final order of the Board, and an order "directing the defendant to process * * * in accordance with the mandate of this Court, plaintiff's application for suspension of deportation."

In light of the relief requested in the complaint, the Court deems the second ground urged by the defendant District Director to be dispositive of the issues in the case. Although there has been judicial criticism directed at the cases holding a superior officer to be an indispensable party in litigation against the Government, the Court is constrained by precedent to hold that the Attorney General and/or the Commissioner are indispensable parties to the instant action.

(34) In *Vaz* v. *Shaughnessy*, 208 F. 2d 70 (C. A. 2, 1953), the Court of Appeals for this Circuit held that the Attorney General and/or the Commissioner of Immigration are indispensable parties to an action to review an adverse holding of the Board with respect to an application for suspension of deportation. The basis for the *Vaz* holding was characterized by the Court of Appeals in *Pedreiro* v. *Shaughnessy*, 213 F. 2d 768, 769 (C. A. 2, 1954) as involving "an attempt by a concededly deportable alien to review an order holding him not eligible for suspension of deportation, essentially a discretionary matter * * *". *Pedreiro*, which distinguished *Vaz* on the aforementioned basis, held that the Attorney General and/or the Commissioner of Immigration are not indispensable parties to an action to re- [fol. 26] view a deportation order solely on the ground that the *findings of deportability* were unconstitutional. No application for suspension of deportation was involved.

Both *Pédreiro* and *Vaz* are grounded upon the basic criteria for determining the indispensability of a superior officer declared by the Supreme Court in *Williams* v. *Fanning*, 332 U. S. 490 (1947). "[T]he superior officer is an indispensable party if a decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him." 332 U. S. 490, 493. On the other hand,

the superior is not indispensable "if the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is (35) before the court." *Id.* at 494. *Vaz* and the instant case involve relief against the Attorney General with respect to the discretionary power of suspension of deportation. *Effective* relief cannot be granted merely by preventing the District Director from deporting an admittedly deportable alien. Compelling exercise of the discretionary power to suspend deportation is the *sine qua non* of effective relief in this situation. Without compelling the Attorney General to exercise such discretion, the plaintiff will continue in the status *ad infinitum* of an alien clearly deportable for failure to continue in transit to Mexico. The District Director can never alter plaintiff's status as an admittedly deportable alien; only the Attorney General, *notwithstanding such deportability*, can suspend his deportation. Petitioner recognizes that this uncertain status without more is unsatisfactory for in his prayer for relief in this action he asks that "An order be made and entered herein directing the defendant to process, consonant with law and in accordance with the mandate of this Court, plaintiff's application for suspension of deportation" which order of suspension can be granted only by the Attorney General. See also *Savala-Cisneros* v. *Landon*, 111 F. Supp. 129 (S. D. Cal. [fol. 27] 1953); *Chavez* v. *McGranery*, 108 F. Supp. 255 (S. D. Cal. 1952). On the other hand, *Pedreiro* does not involve an appeal to higher authority. Pedreiro was not requesting a favor which only the Attorney General could grant; his claim was that he had a *right* (36) to remain on our shores because he was not deportable *in the first instance*. See *Gong Poy* v. *Sahli*, 125 F. Supp. 740 (N. D. Ill. 1954). Even his claim may eventually have to be litigated in the nominal presence of the Attorney General: at this date, the Third Circuit and other courts [2] require him

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[2] *Podovinnikoff* v. *Miller*, 179 F. 2d 937 (C. A. 3, 1950); *Slavik* v. *Miller*, 184 F. 2d 575 (C. A. 3, 1950); cert. denied, 340 U. S. 935 (1951); *Paolo* v. *Garfinkel*, 200 F. 2d 280 (C. A. 3, 1952); *Belizaro* v. *Zimmerman*, 200 F. 2d 282 (C. A. 3, 1952); *Rodriguez* v. *Landon*, 212 F. 2d 508 (C. A. 9, 1954).

to be present in some form, neither physical nor spiritual, and the Supreme Court has granted certiorari in *Pedreiro*, 75 S. Ct. 124 (Nov. 25, 1954).[3]

Motion to dismiss granted. So ordered.

Dated: New York, N. Y., April 15, 1955.

Irving R. Kaufman, U. S. D. J.

[fol. 28] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

LUIS ALVARO CEBALLOS (Y ARBOLEDA), Plaintiff,

against

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization Service at the Port of New York, Defendant.

ORDER AND JUDGMENT OF DISMISSAL OF COMPLAINT—April 20, 1955

At New York, New York, in said District on the 19th day of April, 1955.

The plaintiff having filed a complaint against the defendant for judgment pursuant to 5 U. S. C. A. 1009 and 8 U. S. C. A. 1329, declaring plaintiff statutorily eligible for suspension of deportation; setting aside as invalid the final order of deportation against him and directing defendant to process, consonant with law and in accordance with the mandate of this Court, plaintiff's application for suspension of deportation; and the plaintiff having moved by notice of motion dated March 16, 1955 for an order enjoining

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[3] Perhaps the Supreme Court will utilize this opportunity to thoroughly re-examine the policy basis for the standards it set forth in *Williams*, in light of the many persuasive arguments for modification offered by some courts and writers. *E. G. Hart & Wechsler, The Federal Courts and the Federal System* (1953, 1189; *Note*, 54 *Colombia Law Rev.* 1128 (1954); *Pedreiro*, supra, at 770.

and restraining the defendant, pending the hearing and determination of his suit herein, from deporting him under said order of deportation and the defendant having cross moved with respect to the complaint by notice of motion dated March 29, 1955 for an order pursuant to Rule 12 of the Federal Rules of Civil Procedure dismissing the complaint (1) for failure to state a claim upon which relief may be granted; (2) for failure to name an indispensable (38) party (i.e., the Attorney General and/or Commissioner [fol. 29] of Immigration); and (3) in that the plaintiff's form of remedy is inappropriate for relief; and the said motions having come on to be heard before the court on March 31, 1955 and the court having rendered a decision on April 15, 1955 dismissing the complaint on the sole ground that the Attorney General and/or Commissioner of Immigration is an indispensable party, and ordering the complaint herein dismissed; Now in accordance with said decision, it is

Ordered and Adjudged that the above entitled complaint be and it hereby is dismissed; and it is

Further ordered and adjudged that the plaintiff's motion for a temporary injunction be and it hereby is denied.

Irving R. Kaufman, U. S. D. J.

The foregoing order is consented to as to form, and notice of settlement is hereby waived, this 19th day of April, 1955.

J. Edward Lumbard, H. J. R., U. S. Attorney, Southern District of New York, Attorney for Defendant.

Judgment entered.

William V. Connell, Clerk.

April 21, 1955.

[fol. 30] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PLAINTIFF'S NOTICE OF APPEAL—April 20, 1955.

Sir:

Please take notice that the plaintiff above named hereby appeals to the United States Court of Appeals for the Second Circuit from the final order and judgment dismissing the complaint in the above entitled action and denying plaintiff's motion for temporary injunction made and entered herein respectively on April 15, 1955 and April 19, 1955.

Dated: New York, N. Y., April 20, 1955.

Yours, etc., Blanch Freedman & Gloria Agrin, Attorneys for Plaintiff, Office & P. O. Address: 220 Broadway, Manhattan.

To: Hon. J. Edward Lumbard, Esq., United States Attorney for the Southern District of New York, Attorney for Defendant, Office & P. O. Address: United States Court House, Foley Square, New York, N. Y.

[fol. 31] U.S. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE NEW YORK, N. Y.

[Title omitted]

TRANSCRIPT OF HEARING OF JULY 31, 1951 BEFORE IMMIGRATION AND NATURALIZATION SERVICE

File No. 0300-112629, C. O. No. A-7662411, Hearing Officer: Aaron I. Maltin, Stenographer: John Yonke, Interpreter: None, Language: English, Hearing conducted at 70 Columbus Ave., N. Y. C. 23, N. Y.

Date: July 31, 1951.

COUNSELS:

Carol King, Esq., 220 Broadway, N. Y. C., N. Y., James O. Berlinger, Esq., 220 Broadway, N. Y. C., N. Y.

[fol. 32] Hearing Officer to Respondent:

Q. What is your name?

A. Luis Alvaro Ceballos Arboleda.

Q. Will you please stand and raise your right hand and be sworn. Do you solemnly swear that all the testimony you will give in this proceeding will be the truth, the whole truth, and nothing but the truth, so help you God?

A. Yes, sir.

Q. You are informed that this hearing is being given to you in order to determine your right to be and remain in the United States and to give you an opportunity to show why you should not be deported from the United States. Do you understand?

A. Yes.

Q. Are these your attorneys who are here with you?

A. Yes, they are.

Hearing Officer to Counsels:

Will you both please identify yourselves for the record.

By Counsels:

Carol King, 220 Broadway, New York City 7. Telephone (2) number, Cortland 7-3318. Admitted to practice before the Immigration Service and the Board of Immigration Appeals.

James O. Berlinger, 220 Broadway, New York, N. Y., Cortland 7-6960. Application for admission pending.

Hearing Officer to Counsels:

There is no objection to both counsels representing the respondent. However, it would be best if one should speak during the course of the hearing. Will you designate who will speak.

[fol. 33] By Counsel (James O. Berlinger):

Mrs. King will act as counsel in the hearing in all matters.

Hearing Officer to Counsel (Carol King):

Are you ready to proceed?

By Counsel (Carol King):

Subject to certain preliminary motions, I am ready to proceed. Mr. Presiding Inspector, have you been appointed in accordance with the Administrative Procedures Act?

By Hearing Officer to Counsel:

I am a Hearing Officer and my appointment is under the ordinary Civil Service rules for the appointment of Hearing Officers in this Service.

By Counsel (Carol King):

I ask that you disqualify yourself in view of the decision of the United States Supreme Court in the case of Sung against McGrath, 339 U. S. 33, and the further opinion of Judge T. Allan Goldsborough in the case of Potash against the United States which was a decision without opinion on the eve of his death.

By Hearing Officer:

Your objections on those grounds are overruled.

By Counsel (Carol King):

(3) I further object to the Hearing Officer upon the ground that he is acting as judge and prosecutor, and that a one-man hearing is a violation of due process of law and in conflict of the Constitution.

[fol. 34] By Hearing Officer to Counsel:

Your objections on those grounds are likewise overruled.

Hearing Officer to Respondent:

Q. I have here a warrant of arrest issued by the District Director in New York on April 23, 1951, wherein it is charged that one Luis Alvaro Ceballos Arboleda who entered this country at New York by plane on April 2nd, 1951, is in the United States in violation of the immigration laws. I show you this warrant of arrest and ask if you are the person who is referred to in it?

A. I am.

Q. Was a copy of that warrant of arrest served on you on April 23, 1951?

A. Yes, it was served on April 23rd.

Q. You are at liberty now under a bond in the sum of $1,000.00; are you not?

A. Yes.

By Hearing Officer:

Copy of the warrant of arrest is entered into evidence as Exhibit No. 1.

Hearing Officer to Respondent:

Q. The charge in the warrant of arrest is that you have violated the Immigration Act of 1924, because after you were admitted as a transit you failed to maintain the status of a transit in the United States. Do you understand this charge?

A. I understand the charge.

Q. I have before me an affidavit which I show you and ask you if this is your signature contained thereon?

A. Yes.

Q. Do you recall signing and swearing to the contents of this document on April 20, 1951, in this building?

A. Yes, sir.

By Counsel:

(4) No objection.

[fol. 35] Hearing Officer:

Affidavit of respondent, dated April 20, 1951, is entered into evidence as Exhibit No. 2.

Hearing Officer to Respondent:

Q. I have before me a Form 257A, and ask you if you received this and two other copies of this Form from an American Consulate abroad?

A. Yes.

Q. And was this copy returned to you at the time of

your admission to the United States on April 2, 1951 by the immigration officer?

A. Yes.

By Hearing Officer:

There is before me, Form 257A bearing number V-499210, issued in the name of the respondent, and indicating his purpose and length of intended stay in the United States as transit to Mexico—29 days, and also indicating that he was admitted to the United States at New York on April 2nd, 1951 to April 23rd, 1951, by U. S. Immigrant Inspector J. G. Roche under Section 3(3) of the Immigration Act of 1924.

Hearing Officer to Respondent:

Q. Have you remained continuously in the United States since April 2, 1951?

A. Yes, sir.

Q. Prior to April 23, 1951, did you fill out a form asking for an extension of your temporary admission to the United States?

A. No, sir.

Q. Have you ever been arrested on any occasion for any violation of law?

A. No.

Q. I have before me a report from the Federal Bureau of Investigation showing no criminal record concerning you in this country. Do you understand?

A. Yes.

[fol. 36] By Hearing Officer:

(5) Report from the Federal Bureau of Investigation, dated April 23, 1951, is entered into evidence as Exhibit No. 3.

Hearing Officer to Respondent:

Q. Are you married?

A. Yes, sir.

Q. On how many occasions have you been married?

A. Well, I was married prior to this marriage.

Q. And then you were married twice?

A. Yes.
Q. How did your first marriage end?
A. In divorce.
Q. And when were you divorced?
A. On June 30, 1950.
Q. When were you married to your present wife?
A. January 3, 1951.
Q. Where?
A. New York City.
Q. Do you have any children?
A. From my previous marriage, three.
Q. Where do they reside?
A. They are residing in Mexico now.
Q. Are they all citizens of that country?
A. Yes, they are citizens of Mexico.
Q. Of what country is your present wife a citizen?
A. A citizen of the United States.
Q. Do you have any members of your immediate family in the United States besides your wife?
A. My brother, Carlos Ceballos; he is a visitor here. And I have a brother Salvador who is a legal resident of the United States.
Q. I presume your wife is here today and is prepared to testify as to her citizenship and to establish that she is married to you?
A. Yes, she is here.

Hearing Officer to Counsel:

(6) You may question the respondent if you wish.

[fol. 37] Counsel to Respondent:

Q. Mr. Ceballos, did you go to the Police Department, City of New York, and ask for and secure a police certificate?
A. Yes.
Q. Is this the police certificate that you secured?
A. That is the police certificate.

By Counsel:

I offer it in evidence but would like to retain the fingerprints in order to secure a Mexican police certificate which

I could not secure up until now because I wanted to keep the fingerprints for this hearing.

By Hearing Officer:

Certificate issued by the Police Department, City of New York, dated July 10, 1951, is entered into evidence as Exhibit No. 4.

Counsel to Respondent:

Q. Mr. Ceballos, where are you working at the present time?

A. Commodity Service Corporation, 67 Wall Street, New York City.

Q. Does this letter on the letterhead of the Commodity Service Corporation relate to your employment there?

A. Yes.

By Counsel:

I offer it in evidence.

By Hearing Officer:

Letter on the stationery of the Commodity Service Corporation, New York, N. Y., dated July 26, 1951, is entered into evidence as Exhibit No. 5.

[fol. 38] Counsel to Respondent:

Q. Who are the two officers besides yourself of the Commodity Service Corporation?

A. Mr. Edgar R. Molina and Mr. Sol Slotpole.

(7) Q. Did each of these officers execute a character affidavit in your behalf?

A. Yes, they have.

By Counsel:

I offer two character affidavits in evidence.

By Hearing Officer:

Affidavit of Edgar R. Molina and Sol Slotpole, both executed July 26, 1951, attesting to the good moral char-

acter of the respondent, is entered into evidence as Exhibit No. 6.

Counsel to Respondent:

Q. Mr. Ceballos, you testified that you are married. Is this your marriage certificate?
A. Yes, it is.

By Counsel:

I offer two photostatic copies of the marriage certificate in evidence, and offer the original for purposes of comparison.

By Hearing Officer:

Photostatic copy of Certificate of Marriage, issued by the City Clerk of the City of New York, January 3, 1951, certifying to the marriage of Alvaro Ceballos and Jacqueline Teresa Richot, is entered into evidence as Exhibit No. 7. Original compared and returned.

Counsel to Respondent:

Q. Mr. Ceballos, you testified that you had been previously married in Mexico. Is that correct?
A. Yes.
[fol. 39] Q. And that marriage was terminated by divorce?
A. Yes; correct.
Q. Is this the decree of divorce?
A. Yes, it is the decree of divorce.

By Counsel:

I offer two photostatic copies with certified translations thereof.

(8) By Hearing Officer:

Photostatic copy of document in the Spanish language, to which is attached an authentication by the American Embassy in Mexico, which document is a decree of divorce dated June 30, 1950, together with a certified translation

thereof, is entered into evidence as Exhibit No. 8. Original Spanish document and authentication compared and returned.

Counsel to Respondent:

Q. Mr. Ceballos, at the time that you signed Form 301, did you know that signing that form would interfere in any way with your becoming a citizen of the United States?

A. No.

Q. Will you state the circumstances under which you signed that form in so far as you can recall?

A. I went to my draft board and was presented with Form 301 for signature. At that time it was my understanding that it was a temporary deferment pending indication from the same draft board as to what would be the best choice for me as to whether I wanted to serve in the Colombian Army or the United States Army. I had several conversations with several Colombian boys who found themselves in the same position that I was, and we felt that it was better for us to serve in the Colombian Army fighting for a common cause rather than in the [fol. 40] United States Army where we might be treated as tropical boys. In other words, we felt that language, religion, and idiosyncrasy was to be found in a group of boys from the same country.

Q. Did you at any time deny that you had signed an affidavit refusing to serve in the United States Army?

A. Yes, I denied having signed Form 301 in the Consulate in Mexico City.

Q. If, in fact, you did sign Form 301, how did it happen that you denied signing it?

A. Because as I stated before when I signed Form 301 I understood it to be a choice between the Colombian Army and the United States Army, and never any form or document that might preclude me from becoming a citizen. In so far as I was later called into the United States armed forces and classified 1-A and inducted and went through all my physicals I never thought the fact that I had signed that form before was still in effect. In other words, if I had thought that that form was still in effect

I never would have signed a sworn statement at the American Consulate in Mexico.

(9) Q. Were you ever actually inducted into the United States Army?

A. No. I went through my physicals and then I was classified 4-F.

Q. And after you were classified 4-F did you go to Mexico?

A. Yes; I was transferred by my employer to take charge of the affairs of the company in Mexico.

Q. And at the time that you were transferred, as you put it, did you apply for a reentry permit?

A. Yes, I applied for a reentry permit in this building.

Q. Did you secure that reentry permit?

A. Yes, I was issued a reentry permit but that was mailed to me to Mexico.

Q. And in connection with that reentry permit did you ask your draft board for permission to depart from the United States?

A. I had to, otherwise, I would not have been able to leave the country.

Q. And did you secure this permission from your local draft board?

A. Yes.

[fol. 41] By Counsel:

I offer two photostatic copies, and the original for purposes of comparison.

By Hearing Officer:

Photostatic copy of D.S.S. Form 351, "Permit of Local Board For Registrant to Depart From The United States" is entered into evidence as Exhibit No. 9. Original compared and returned.

Counsel to Respondent:

Q. You testified that when you stated in Mexico City that you had never signed this form, that you did not know that it was still in effect, what do you mean by "still in effect"?

A. As I explained to you before, we—the Latin boys—that were being called to the draft board for examination felt that we were given a different treatment, a different * * * were being treated in a different phase than the natives of this country, and that every case was going to be treated separately. For that reason Form 301 was being issued to every one of us as a temporary deferment until we were told what army to go or to what army we should go. Therefore, when I was told by the United States Army in 1943 that I had to serve in (10) the United States Army, naturally Form 301 ceased to exist as far as I was concerned.

Q. Did you when you were called in 1943 object to being examined for induction into the army? Did you claim that you were not subject to service?

A. No. As a matter of fact I was waiting to be called. I was not making any plans at all. I was waiting to be called in the armed forces.

Q. And what was the only reason that you did not go into the armed forces?

A. I was later classified 4-F.

Q. So that the matter can be entirely clear on the record, did you at any time understand that you were signing a paper by which your citizenship would be effected?

A. No.

[fol. 42] Q. Was that explained to you at any time by anybody in the draft board?

A. Never.

By Counsel:

No further questions.

Hearing Officer to Respondent:

Q. You came to the United States for permanent residence on February 23, 1942; is that correct?

A. Yes, sir.

Q. What was your occupation in the United States for the next year or year and a half?

A. I was employed at Smith Kirkpatrick, New York City and Union Carbide & Carbon Corporation.

Q. In what capacity were you employed by these companies?

A. Export clerk in Smith Kirkpatrick—general export position—and in Union Carbide & Carbon I was a translator.

Q. Then you understand the English language?

A. Yes, I understand the English language.

Q. I show you a DSS Form 301, an "Application By Alien For Relief From Military Service" and ask you if this is your signature contained thereon?

A. Yes, it is my signature.

Q. I now show you a photostatic copy of a document which was (11) obtained from the Selective Service System, and ask you if this is your personal history and statement form filled out and signed by you as indicated?

A. Yes, sir.

Q. I particularly call your attention to question No. 41 and ask if that is your own handwriting in which the word "do" appears therein?

A. It is.

By Hearing Officer:

Photostatic copy of Form D.S.S. 304, "Alien's Personal History and Statement" executed by the respondent June 16, 1943, is entered into evidence as Exhibit No. 10.

[fol. 43] Hearing Officer to Respondent:

Q. You mentioned before about serving in the Colombian Army. Are you aware of the fact that Colombia did not enter the war against Germany until November 26, 1943?

A. I cannot discuss that point because I am not very sure, but I would believe that Colombia broke relations with the Axis at the time of Pearl Harbor.

Q. That is correct. However, Colombia was not at war with Germany or Japan until November 26, 1943, when a state of belligerency was declared, so that I fail to follow your statement that you wanted to join the Colombian Army perhaps in preference to the United States Army in the common cause when there was no common cause at the time you requested deferment.

A. The boys that were studying here at that time, that were going to college in this country at that time, and I discussed the situation according to what we understood it to be. If we went into the United States Army we felt that we would not have the same opportunity of being treated as fair as a native of the United States, and not only because we were aliens but also because being used to tropical climates that we might be sent to places that were extremely full of tropical or other diseases. Therefore, not being able to ask anybody in the draft board about what was the best procedure to follow due to the fact that at that time millions of boys were being drafted and the forms were being handed to you to be filled if you wanted to fill them, then I believe that it was our idea at that time that we were going to be given an opportunity to fight in a squadron that either existed or was going to be formed or originating from Latin America. I further understood that if were going to join such squadron, the same as the 201st from Mexico, that we had to go to our (12) country.

Hearing Officer to Counsel:

If you have no objection I should like to enter into evidence a photostatic copy of Form 301 in lieu of the original.

[fol. 44] By Counsel:

I have no objection.

By Hearing Officer:

Photostatic copy of Form 301, "Application By Alien For Relief From Military Service" will be entered into evidence as Exhibit No. 11.

Hearing Officer to Counsel:

I have no further questions of the respondent at this time. Is there anything additional that you would like to present?

By Counsel:

I would like to ask a few additional questions.

Counsel to Respondent:

Q. Mr. Ceballos, you stated in answer to question No. 41 on Form 304, Exhibit No. 10 in this case, as follows: "I do object to service in the land or naval forces of the United States. What did you think that that meant?

A. I meant that I was to serve in the Colombian Army. In this form it says that I understand it will deprive me from becoming an American citizen. Naturally when this form was signed, as I said before, I understand that it was something temporary, and in so far as I was going to serve in the army that this was obsolete.

By Counsel:

I have no further questions. I wish to present respondent's wife as a witness in his behalf.

Hearing Officer to Witness:

Q. What is your name?

A. Jacqueline Michot Ceballos.

[fol. 45] Q. Will you please stand and raise your right hand, and be (13) sworn. Do you solemnly swear that all the testimony you will give in this proceeding will be the truth, the whole truth, and nothing but the truth, so help you God?

A. I do.

Hearing Officer to Counsel:

You may proceed with the witness.

Counsel to Witness:

Q. Mrs. Ceballos, are you the wife of the respondent?

A. Yes, I am.

Q. Is this your marriage certificate?

A. Yes, it is.

(Shown original of Exhibit No. 7.)

Q. Are you a citizen of the United States?

A. Yes.

Q. How did you become such citizen?

A. I was born here of American citizens.
Q. Is this a certificate of your baptism?
A. Yes, it is.

By Counsel:

I offer photostatic copies in evidence together with the original for purposes of comparison.

By Hearing Officer:

Photostatic copy of document issued by the Church of St. Ann in Mamou, Louisiana, dated September 27, 1925, certifying to the baptism of Teresa Jacqueline, child of Louis Michot, born in Mamou, Louisiana, on September 8, 1925, and baptized on September 27, 1925, the said document not bearing the seal of the church, is entered into evidence as Exhibit No. 12. Original compared and returned.

Counsel to Witness:

Q. Mrs. Ceballos, where did you get that baptismal certificate?
A. Well, I got it from my parents.
[fol. 46] Q. How long ago did you get it from your parents?
A. Five or six years when I came here I took it with me.
Q. In other words, when you left Louisiana?
A. I took it with me.
(4) Q. Do you know whether they keep birth records in Mamou, Louisiana?
A. No, I don't think they do. I wrote for mine and they said they sent to New Orleans for it, and I secured a birth certificate on which I obtained an American passport.

By Counsel:

If it should be necessary to secure another copy of that birth certificate, same will be furnished.

Counsel to Witness:

Q. Mrs. Ceballos, why did you marry your husband?
A. Because I loved him.

Q. Have you lived continuously with the respondent since the date of your marriage?

A. Yes, I have.

Q. Has he supported you or have you worked and supported yourself since that time?

A. He supported me.

Q. In other words, you are wholly dependent on your husband for support?

A. Yes, I am.

Q. When you came to the United States in April 1951 how were you feeling?

A. Well, I was not feeling too good.

Q. And what did you do about not feeling too good?

A. Well, I went to see this doctor I had known and he examined me and told me that I should take very good care of myself, and advised me to find a good doctor, which I did, and he happened to know of the doctor and said that he was a very fine doctor, so I am under that other doctor's care right now.

Q. And what are you under that doctor's care for?

A. Because I am pregnant.

Q. Have you had any difficulty with that pregnancy?

A. Yes, I have.

[fol. 47] Q. As a result of that difficulty did you and your husband (15) change your plans in any way?

A. Yes, we did.

Q. In what way?

A. I decided that it was best to stay here after both doctors had advised me that it was best because of the conditions in Mexico and because I was here with my family and I would get the best medical care here and my child would get the best medical care, but whereas in Mexico I hear, and the doctors have told me, that the medicine is not as good, the food is very bad for children, and I have heard of many cases of pregnant women, especially women who have been having difficulties during the time of their pregnancy and had lost their babies or something happened to them—their health—because they did not have the medical care that we can get over here and also I understand that in delivering a baby they don't use the same methods so that it is sort of antique; how do you say—old

fashioned. They don't help the mother as much. She bears a child as though she was having it 200 years ago.

Q. And is that the reason why you wanted to stay in the United States?

A. And I would also like my child to be an American citizen and reared here and I would like him to go to American schools.

Q. And did you tell all this to your husband?

A. Yes.

Q. And as a result of that he stayed with you in this country?

A. Yes.

Q. When you left Europe where had you intended to come?

A. Well, we were going to go on to Mexico.

Q. Would you be effected economically if your husband was deported?

A. I guess so; yes.

Q. What do you mean by that? Could you be more specific?

A. Well, if he is over there and I am over here I guess there would be some difficulty in supporting two families. I could still not be too sure if a man and wife is separated for a long time. You never can tell what happens, and I have no way of being sure.

Q. You are sure now?

A. Yes.

[fol. 48] (16) By Counsel:

No further questions.

Hearing Officer to Witness:

Q. When do you expect your child?

A. October 15th.

Q. Did you know you were pregnant when you came to the United States in April 1951?

A. Yes, I did.

Q. How long have you known your husband?

A. Well—let me see. I would say almost two years.

Q. You travelled with your husband to the United States on one occasion from Mexico; is that not correct?

A. Yes, it is.

Q. And that was in June 1950?

A. Yes.

Q. Were you aware at that time that your husband was still married to someone else?

A. No, I was not.

Q. Were you under the impression that he was single or divorced?

A. No—divorced.

Q. Did he tell you that he was divorced?

A. Well—yes.

Q. There is now in evidence a decree of divorce indicating that the proceeding was not concluded in Mexico until June 30, 1950. Are you aware of that now?

A. Yes, but I knew that the divorce was in process.

Q. Did you ever live with your husband as man and wife prior to your marriage?

A. Yes, I did.

Q. Have you lived in Mexico for any length of time before?

A. Well, I visited there.

Q. What is the longest period of time you ever spent in Mexico?

A. I think it was a month and a half.

Q. If it was determined that your husband was not eligible for permanent residence in this country, what would you do?

(17) A. Well, I would stay here.

Q. You would give up your marriage then, in other words?

A. No, I don't think I would.

Q. You mean eventually you might join your husband after your child was born?

A. No. I would hope that he can come here.

[fol. 49] By Hearing Officer:

I have no further questions of the witness.

Hearing Officer to Counsel:

Do you have anything further?

By Counsel:

No.

Hearing Officer to Respondent:

Q. From the record before me, the only relief which you may possibly be eligible for is to ask to be permitted to leave the United States voluntarily instead of being deported from this country. So that I ask you now: Do you wish to make an application to be permitted to leave the United States voluntarily instead of being deported?

A. I would have to ask my counsel.

Hearing Officer to Respondent:

Yes.

By Respondent:

I would be willing to leave if I could come back for permanent residence.

Hearing Officer to Respondent:

Q. Am I to understand then from this answer that you are at this moment not prepared to leave voluntarily?

A. No.

By Counsel:

If the respondent is not accorded suspension of deportation he would like to secure voluntary departure and pre-examination, (18) or even voluntary departure without pre-examination provided that the Consul would grant him a permanent visa to return to this country.

[fol. 50] Hearing Officer to Respondent:

Q. What sources of income do you have at present?

A. I am a managing director of the Commodity Service Corporation and I earn $250 a week.

Q. Do you have any other source of income?

A. No, sir.

Q. What is the state of your assets in this country?

A. I have invested a substantial amount of money in the Commodity Service Corporation.

Q. Do you expect to receive any return on that money in addition to your salary from the company?

A. Yes. If any profits are made I make 52% of the profits.

Q. Do you have any property in Mexico?

A. Not now.

Q. What happened to the property you did have in Mexico?

A. I assigned it to my children from my previous marriage.

Q. When did you do that?

A. About May of 1950.

Q. You are the owner of a business called the American Traders?

A. Pan-American Traders.

Q. Are you still the owner of that business?

A. That is in liquidation, and the company has no assets now.

Q. On June 12, 1950, when you were examined by a Board of Special Inquiry in San Antonio, Texas, you said that business was worth 200,000 pesos and that you owned 50% of it. What happened since then?

A. My share in the business was transferred over to Commodity Service Corporation as part of my investment in Commodity Service.

Q. You also indicated that you were the owner of a cotton ranch in Matamoros.

A. That was assigned to my children.

Q. You also indicated that you were the owner of a cotton gin (19) in the same place.

A. That was assigned to my children.

Q. You also indicated that you had a house in Mexico City.

A. Yes. That was assigned to my children.

Q. When did you invest your money in the Commodity Service Corporation?

[fol. 51] A. I invested my money in Commodity Service on May 4, 1950 while I was still in Mexico.

Q. You knew at that time that you did not have permission to enter the United States for permanent residence?

A. Yes, but I intended all the time to operate from Mex-

ico because Mexico had been my center of operations for all these years, and, as a matter of fact, the idea of setting up Commodity Service Corporation here was to form a new company in Mexico under my supervision, and I was going to buy things down there—agricultural products in Mexico—and ship them here to the United States.

Q. What happened to your plans to remain in Mexico a representative of this company?

A. While in Mexico we bought a very substantial amount of olive oil in Spain, and because of the language facility—my knowledge of the Spanish language—I was sent as a representative of the firm—Commodity Service—to Spain.

Q. When you came here on April 2, 1951, was it your intention to remain permanently in the United States?

A. No, it was not my intention. I was going to Mexico to continue with this plan.

Q. Outside of the considerations of your wife, what else prevented you from going to Mexico, if anything?

A. I do not have any particular reason for not wanting to go to Mexico other than that considering the way my wife feels about remaining here in the United States and the fact that so many things are left behind in Mexico, I would very much like to remain here; my business is here, my wife is from this country, and my relatives—my other brothers—are moving to this country, and this is the place where I should be.

Q. When were you last in Colombia?

A. As a foreign representative for Commodity Service I had to go to Lima, Peru, to set up an office there, and I visited Colombia twice both on my way down and on my way up to Mexico.

Q. When was that?

(20) A. October 1950.

Q. You at one time indicated that you had invested as much as the sum of $190,000 in the Commodity Service Corporation; is that correct?

A. Yes, it is true.

[fol. 52] Q. When you went to Mexico in 1946 were you the possessor of any great wealth of any kind?

A. In 1946 I—Yes, I was in the hides business at that time.

Q. In what activity or business did you acquire most of your money?

A. Importing and exporting hides—importing hides from Colombia.

Hearing Officer to Counsel:

Do you have anything further?

By Counsel:

No.

Hearing Officer to Respondent:

Q. In the event that you are ordered deported from the United States, what country do you wish to specify as the country to which you shall be deported?

A. I am a citizen of Mexico.

Q. Am I to understand then that you prefer to be sent to Mexico?

A. Yes.

By Counsel:

This man is extremely eager to regularize his immigration status in the United States. He believes that whatever effect the signing of the Form 301 had should be eliminated in view of his lack of understanding of what he was doing. He wishes to test out this question but without prejudice to his right to ask for and accept voluntary departure at a later stage of the proceeding when the question of the Form 301 has been finally adjudicated.

Hearing Officer to Respondent:

Q. I will now state for the record and in your presence my decision in this matter. Do you understand?

A. Yes.

* * *

[fol. 53] (21) Hearing Officer to Respondent:

Q. Did you understand the decision I have just made?

A. Yes.

Hearing Officer to Counsel:

You have the right to take exception to my decision, in which event this will serve as an appeal to the Commissioner in Washington, D. C.

By Counsel:

I do, but I should like to be given a reasonable time after securing a copy of the record and so many of the exhibits as the Government has in its possession.

Hearing Officer to Counsel:

In view of the complexities of this case you are granted an extension of time, within which to file exceptions, to five days from the service upon you of the record of hearing herein.

By Hearing Officer:

Hearing closed.

I certify that the foregoing is a true and correct transcript of my shorthand notes of the testimony taken by me in the above case.

John Yonke, Stenographer.

I certify that to the best of my knowledge and belief this record is a true report of everything that was stated during the course of the hearing, including oaths administered and the rulings on objections, except statements made off the record.

Aaron I. Maltin, Hearing Officer.

AIM/jy
r. 7/31/51
t. 8/10/51

[fol. 54] UNITED STATES DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE NEW YORK, N. Y.

[Title omitted]

TRANSCRIPT OF REOPENED HEARING OF MAY 25, 1953
BEFORE IMMIGRATION AND NATURALIZATION SERVICE

0300-112629

Special Inquiry Officer: Aaron I. Maltin
Stenographer: Marcelline Brady
Language: English
Hearing conducted at: Ellis Island, N. Y. H.

Date: May 25, 1953

COUNSEL:

Blanch Freedman, 220 Broadway, New York, N. Y. and James O. Berlinger, 220 Broadway, New York, N. Y.

[fol. 55] Reopened Hearing

Special Inquiry Officer to Respondent:

Q. Will you please stand and raise your right hand to be sworn. Do you solemnly swear that all the testimony you will give at this hearing today will be the truth, the whole truth and nothing but the truth, so help you God?
A. I do, sir.
Q. Where do you reside at present?
A. 3725 Henry Hudson Parkway.
Q. With whom do you live there?
A. With my wife and my child.
Q. What is the name of your child?
A. Douglas Christopher Ceballos.
Q. Where and when was he born?
A. October 29, 1951, in New York City.
Q. Are you the sole support of your wife and child?
A. Yes sir.
Q. Are you still a citizen of Mexico?
A. Yes sir.
Q. I presume you are aware that by an order of the

Board of Immigration Appeals dated January 6, 1953 your hearing has been ordered reopened (23) for the consideration of further evidence?

A. Yes sir.

By Attorney Freedman:

Mr. Hearing Officer, I think the order of the Board of Immigration Appeals indicates the purpose and the limited scope for which this hearing was called, namely, to determine the date a state of belligerency existed, and for a further field investigation of the case of Mr. Ceballos. Now, if this is a generally reopened hearing and that is your impression I would like the record to indicate my disagreement with such thinking.

By Special Inquiry Officer:

It is my belief that any hearing that is ordered reopened is reopened for all purposes for my consideration once the [fol. 56] hearing has been reopened. It is true of course that the Board of Immigration Appeals direction as to what shall be included in the record will of course be carried out. If anything new or vital to the decision in this case should be included I will include it in the record. There are no limitations on what may be entered into evidence except as to its relevancy.

Special Inquiry Officer to Respondent:

Q. I now show you report of investigation that was conducted recently and ask if you have anything to say about it?

A. I have nothing to say.

By Attorney Freedman:

I have no objection to this.

By Special Inquiry Officer:

Report of investigation dated April 17, 1953 is entered into evidence as Exhibit 12.

Special Inquiry Officer to Counsel:

I understand you exhibited to the Board of Immigration Appeals a document with reference to when Colombia became a co-belligerent in World War II.

By Attorney Freedman:

Mr. Inquiry Officer, we did more than exhibit. We submitted the original communications from the Colombian Embassy dated October 24; (24) 1951, with certified English translations thereof, advising that Colombia declared a state of belligerency against the Axis Powers by decree on November 26, 1942. If the record does not at this time contain the original letter I will be pleased to submit to you true photostatic copies of the same instruments.

[fol. 57] By Special Inquiry Officer:

Photostatic copy of letter on the stationery of the Colombian Embassy, Washington, D. C., dated October 24, 1951, addressed to Joseph A. Fanelli, signed by Minister Counselor, together with certified translation thereof, is entered into evidence as Exhibit 13.

Special Inquiry Officer to Respondent:

Q. I have before me a report of an investigation that was conducted by this Service, which I now show you.

By Attorney Freedman:

I object to the introduction into evidence of the handwritten statement by one Mr. Harris who, as far as I am concerned, is an unidentified officer of the Service, on the grounds that whatever statements he has set forth in his report is pure hearsay. It is in no way verified or substantiated. However, I will not object to the admission into evidence of the document that purports to be a certified copy of a decree made by the Government on December 22, 1941 with reference to the subject matter under discussion and which seems to emanate out of the office of the New York Consul and Central Office.

By Special Inquiry Officer:

Your objection is overruled.

By Attorney Freedman:

Exception.

By Special Inquiry Officer:

Report from Ralph P. Harris, Acting Assistant Chief, Investigation Section, New York, dated April 20, 1953, is entered into evidence as Exhibit 14.

[fol. 58] By Attorney Berlinger:

May I say something at this point? Will we have opportunity to (25) examine the lady named in that report of Mr. Harris, so that we can determine what the sources of her alleged information was, to go further and find out then whether or not that has any accuracy, because Mr. Harris' report appears to be hearsay upon hearsay, and nothing contained in it refers to anything other than what they were told. May we have the right to subpoena her, or will you produce her at the next hearing?

By Special Inquiry Officer:

I will not produce her at the next hearing. However, if you make request that a subpoena be issued for her appearance I will then consider whether that will be done.

By Attorney Freedman:

May we consider such request as having been made now?

By Special Inquiry Officer:

I will pass upon it at a later time when I have concluded with the hearing today, and when I have gathered certain further information, when it will be more easily ascertain- whether that testimony will be vital to the decision in the case.

By Attorney Berlinger:

I make one further motion. If the Hearing Officer is not now in a position to determine whether that testimony is

vital, that that paper be marked for identification and not in evidence until such time as its competence as well as its relevance can be established.

By Special Inquiry Officer:

The rules of hearsay are not binding in administrative hearings of this nature and I have accepted it and will allow it to remain in evidence.

[fol. 59] By Attorney Berlinger:

Exception.

By Special Inquiry Officer:

Decree dated December 22, 1941, certified as authentic copy by the Consul General of Colombia at New York, on March 17, 1953, together with a letter which forwarded that decree to the Colombian Consul from the Colombian Embassy in Washington dated March 5, 1953, together with certified translations of both documents, are all together (26) entered into evidence as Exhibit 15.

By Attorney Freedman:

May I see the last Exhibit 15 please, the full exhibit?

Special Inquiry Officer to Respondent:

Q. I now show you transmittal memorandum from the National Headquarters of the Selective Service System in Washington, D. C. dated June 3, 1943, and I particularly call your attention to the last page of the four pages, page number LBM 112-5, under which there are listed all neutral countries as of that date, and Colombia appears therein, and I ask if you have any comment to make about that document?

By Attorney Freedman:

If it is your intention to offer this into evidence, Mr. Inquiry Officer, I object to it. There is nothing to show at all that this slip of paper appears numerically and naturally with this communication. I also do not know the source of the communication. It is neither signed nor certified in

any way as being a true communication. There is nothing to indicate whether there has been anything that appeared on this immediately after, or whether this is a true copy [fol. 60] of a memorandum that went out. This is printed material issued some time—if at all—on June 3, 1943, and there is no proof or indication that it was ever communicated to him, or that it is a correct document as to the state of affairs.

By Attorney Berlinger:

This is objected to as incompetent. It is merely a memorandum exchange inter-office between two divisions of National Selective Service, and statements contained in it are not the best evidence, and therefore are not evidence of any materials contained therein. We would have no objection to any certified instrument or decree which will show what this purports to indicate, but this is not acceptable proof.

By Special Inquiry Officer:

I will attempt to obtain a certified copy of the decree of November 16, 1942, which is referred to in Exhibit 13 and if I can obtain that decree it may not be necessary to enter as evidence the document just offered, so that it will not at this time be placed in evidence. However, your objection to it is overruled.

In view of the evidence which is now before me, which creates some (27) confusion as to when Colombia actually entered World War II or became a co-belligerent, it will be necessary to defer this hearing to obtain the decree mentioned and any other evidence which might have a bearing on this issue. Do you wish to question respondent or offer any other evidence before I adjourn?

By Attorney Freedman:

If it is going to be adjourned I will do it on the adjourned date. There is no point in prolonging this hearing unnecessarily.

[fol. 61] By Special Inquiry Officer:

Hearing adjourned.

• • •

AIM:mb

I certify the foregoing pages 22 to 27 inclusive to be a true and correct transcript of my shorthand notes taken in the above case.

Marcelline Brady
Marcelline Brady, Stenographer

I certify that, to the best of my knowledge and belief, the record is a true report of everything that was stated during the course of the hearing, including oaths administered and the rulings on objections, except statements made off the record.

Aaron I. Maltin, Special Inquiry Officer

[fol. 62] UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
NEW YORK, NEW YORK

[Title omitted]

TRANSCRIPT OF HEARING OF JANUARY 25, 1954

File No.: 0300-112629
C. O. No.: A7 662 411
Special Inquiry Officer: Aaron I. Maltin
Stenographer: David J. Peacker
Interpreter: None
Language: English
Hearing Held At: Ellis Island, N. Y. Harbor
Date of Hearing: January 25, 1954

COUNSEL:

Blanch Freedman (present), 220 Broadway, New York City and James O. Berlinger (not present), 220 Broadway, New York City.

[fol. 63] Continued Hearing

Special Inquiry Officer to the Respondent:

Q. You are advised that you are still under the oath which you took at the time of your last appearance before me on May 25, 1953. Do you understand?

A. Yes, sir.

Special Inquiry Officer to Counsel and the Respondent:

Q. I now have before me a letter from the Colombian Embassy in Washington, dated September 2, 1953, to which is attached a number of documents in the Spanish language which have been translated, and I show these documents to you and ask if you have any comment you wish to make about it?

By Counsel:

A. I have no comment that I wish to make with respect to it at this time.

By Special Inquiry Officer:

Letter on the stationery of the Colombian Embassy, dated September 2, 1953 together with the documents in the Spanish language referred to in that letter and which are attached, and also together with translations of those Spanish documents are altogether entered into evidence as Exhibit #16.

(29) By Counsel:

With respect to your offering it into evidence, I'd like the record to indicate my objections to their admission into evidence on the ground that there is no opportunity being afforded us to examine the maker of the documents or the signer of the letter. There is nothing that I know of my own knowledge to warrant authenticating or accepting as authentic all of these instruments.

[fol. 64] By Special Inquiry Officer:

Your objection is noted, but it is definitely overruled.

By Counsel:

Except.

Special Inquiry Officer to Counsel:

Q. Do you wish to question the respondent?
A. Yes, I do.

Counsel to the Respondent:

Q. Mr. Ceballos, what is your marital status at the present time?
A. I'm married to an American girl.
Q. Are you still married to Theresa Jacqueline Michot?
A. Yes.
Q. The person you were married to when we had a hearing in this case a year or so ago?
A. Yes.
Q. And the certificate of that marriage was introduced into evidence and has been marked Exhibit 7, is that correct?
A. Yes.
Q. Have you had any children?
A. Yes, I have two children by that marriage.
Q. Give their names and their ages?
A. Douglas, age * * *
Q. (Interrupting) When was he born?
A. He was born on October the 29th, 1951, and Dennis, born August 14, 1953.

By Counsel:

Now, I ask that I be given permission to submit the birth certificate (30) for the son Douglas. I do not have it with me. I assumed since we have submitted it at the hearing before the Board of Immigration that it would be in the file, but I have since learned that it is not in their file. I [fol. 65] want an opportunity to submit the birth certificate of the child.

I now offer in evidence the birth certificate of respondent's son Dennis born on August 14, 1953.

By Special Inquiry Officer:

Do you wish to stipulate then in evidence a birth certificate for Douglas?

By Counsel:

That is correct.

By Special Inquiry Officer:

Birth certificate relating to Douglas Ceballos, when received, will be entered into evidence as Exhibit #17; and certificate of birth relating to Dennis Ceballos is now entered into evidence as Exhibit #18.

Counsel to the Respondent:

Q. I believe you testified that you first entered the United States—not first entered the United States in February, February 23, 1942 for permanent residence, is that correct?

A. Yes.

Q. At the time you entered the United States, that was at the port of New Orleans, is that correct?

A. Yes.

Q. How soon after you entered the United States did you register under the Selective Service Act for the draft?

A. Was May, early in May.

Q. Of what year?

A. Of 1942.

Q. Do you recall where you went?

A. Yes, I went to draft board number 40.

Q. And that was the board that was located at 349 East 58 Street?

A. Yes.

Q. What happened when you registered, were you given any forms to fill out, were you given any information?

A. They gave me a registration card.

[fol. 66] Q. Yes?

A. And registration card and form with the particulars.

(31) Q. Can you recall whether that would be called form 40, which was Selective Service questionnaire?

A. Yes, that was some questionnaire, yes.

Q. Now, how soon after did you fill that out after you registered, you recall, on May 4, 1942?

A. Yes, well, somewhere around that month.

Q. In the same month you filled that out and you filed that form, is that correct?

A. That's right.

Q. So that would be sometime in May of 1942. Did you discuss your status at that time with the local board, when you filed the questionnaire?

A. My status as to what?

Q. As to your serving the United States Army, was there any discussion had with the Board in May of 1942?

A. No, I don't think there was any discussion at the time.

Q. Was anything said or did you say anything?

A. Well, we did talk about serving in the United States Army, but nothing specific because I just went to register.

Q. Did you ever go to the Board after you filed the questionnaire in May of 1942?

A. Yes, I lost my card, my registration card and I went to get a copy.

Q. And did you get it?

A. Yes.

Q. Do you recall when that was?

A. That was about July.

Q. Did you ever have any occasion to go to the Board in addition to or other than the occasion that you went to advise them that you had lost your registration certificate and to request a duplicate?

A. Yes, I went there again to notify them of my change of address, I was living before in 58th Street, and then I moved to Forest Hills.

Q. Did you on any of these occasions that you appeared at the Board have occasion to discuss with the Board your status?

A. Well, I discussed it with the Board and many other Colombian fellows that were registered in the same Board.

[fol. 67] Q. What did you discuss with the Board?

A. The question of serving in the Army.

Q. Specifically, what was your problem or what was it that you discussed with the Board?

(32) A. Well, the question, as I recall, was that, that we were going to serve in a group, in a division of Colombians within the United States Army.

Q. When next did you hear from the Selective Service Board?

A. Well, they told me that they will notify me on this thing, and then it must have been May or June of the following year.

Q. That would be 1943?

A. 1943 when I heard from them.

Q. And when you say you heard from them, in what manner did you hear from them?

A. I got papers from the mail, long form with questions of all the places. As a matter of fact, two forms, if I remember right.

Q. Now, this form that you received from the Selective Service Board in the mail sometime in the end of May or the beginning of June, would that be the form that has been—a copy of the form that has been marked in evidence as Exhibit 10, known as form 304, which is designated as the alien's personal history and statement?

A. Yes.

Q. What did you do when you received that form in the mail, if anything, that, together with the other forms that you referred to?

A. I went to the draft board.

Q. Did you discuss the form with the draft board?

A. Yes.

Q. What was the nature of that discussion?

A. They have told me the year before that they were going to notify me with regard to this particular group of Colombians that was going to be made up, and then, of course, before I fill out anything else I went over there to discuss it.

Q. Now, in the form 304 under question or item number 41 apparently you filled in the word "do" so the sentence reads—I do object to service in the land and naval forces [fol. 68] in the United States. Do you have any recollection concerning that answer or that statement?

A. Yes, well, I—I do remember it because we have been discussing right along with the Colombian boys and the draft board the fact what would be the place where we would fight in serving with the U. S. Army, the question of this group or division was been discussed. Now, when I sign this form I put in it where "I do"—it was done on the understanding that there were going to set this—make up this particular group.

Q. Who was to determine whether you would serve in what you call the Colombian Division of the United States Army or in a general division of the United States Army —who would make that determination for you?

(33) A. As far as I was concerned the draft board, I don't know that it has.

Q. But you were not to determine—make that determination, you were only putting in the request that if they set up such a division you be included?

A. Yes.

Q. Did you ever go to the Board in person or did you ever make an application of the Board in writing, requesting that they give you a form designated DDS 301, which is entitled Application for Relief from Military Service by an Alien?

A. No, I never did.

Q. Did you ever want or desire relief from military service?

A. I never asked for it.

Q. Did you desire relief from military service?

A. No.

Q. Was it ever your intention to take or make or secure relief from military service?

A. No.

Q. After you filled out the questionnaire known as 304 and the other documents, did you submit them to the local board?

A. Yes.

Q. And that was done on June 16, 1943, is that correct?

A. Yes.

Q. When next did you hear from the Board or receive any mail from the Board?

A. Must have been about two months later, around August.

[fol. 69] Q. What did you hear or receive in August?

A. I received this form 301.

Q. Did that come to you in the mail?

A. Yes.

Q. I show you this form 301, marked Exhibit 11, and ask you whether this is a photostat of the document or papers you received in the mail from the Selective Service Board in or around August of 1943?

A. Yes.

Q. When you received this document in the mail, was it typed out and filled out the way it is now?

A. Yes.

Q. In other words, all the information that is contained on this document was already on the document when you received it, is that correct?

A. Correct.

(34) Q. Is that true for this registration number or did you——

A. (Interrupting) No, I—the only thing I inserted was my signature and the number of my registration card.

Q. Your alien registration?

A. That's my handwriting, yes.

Q. The rest was typed, but you did not type it?

A. No.

Q. You don't know who typed it?

A. No.

Q. It came to you typed?

A. Yes.

Q. Now, had you at any time requested or asked in any manner the Selective Service Board to give you or send you this form 301?

A. Never.

Q. What did you do after you received this form, which you say you received in the mail?

A. I went to the draft board.

Q. Did you have a discussion with them with reference to it?

A. We went over the thing again about serving in it,

this question about serving in the Army, this particular division of the United States Army.

Q. What do you mean by this "particular division of the United States Army"—you mean the Colombian division?

A. Yes.

Q. And what were you advised?

A. They just say sign this form here and we'll let you know.

[fol. 70] Q. Did you know or did you understand when you signed this document that you were asking to be relieved from military service?

A. No.

Q. Were you at that time or at any time prior thereto or at any time after, in fact seeking to be relieved from the military service or in the United States Army or in the army of any other country that might be fighting along with the United States?

A. No.

Q. Was it your desire and intention to serve in the United States Army at this time?

A. Yes.

Q. When you were advised that you would hear from them, did you subsequently (35) hear from the local board?

A. Oh, yes.

Q. When you next heard from them, were you told to appear for induction in the Army?

A. Yes.

Q. Around when was that?

A. About five months later, about January, I think.

Q. January of 1944?

A. Yes.

Q. And did you appear for induction?

A. Yes.

Q. And were you physically examined?

A. Oh, yes.

Q. And what occurred as a result of your physical examination?

A. I was excluded, I was not accepted, I was rejected.

Q. Why?

A. Because of a kidney ailment.

Q. Were you suffering from chronic nephritis?

A. Yes.

Q. And was that the basis of your classification 4F?

A. That's right.

Q. You were classified 4F, is that not right?

A. Correct.

Q. When you received a notification from the Selective Service Board to appear for induction, Mr. Ceballos, did you know at that time that you were being called to serve in a general division of the United States Army or in a Colombian division?

A. It was not received, it was the United States Army I was called to serve in.

Q. And did your receipt of this notice seem in accordance with the general understanding that you were given [fol. 71] by the Board as to what the procedure would be and how events would transpire?

A. That's right.

Q. After you were classified as 4F were you still under the jurisdiction of the Selective Service Board?

A. Oh, yes.

Q. Did you make application to the Board for permission to leave the United (36) States for a short period to go to Mexico?

A. Yes.

Q. And did they grant you such permission?

A. Yes.

Q. Did you at any time refuse to serve in the United States Army?

A. No.

Q. Were you at any time reluctant or non desirous of serving in the United States Army?

A. No.

Q. When you entered the United States in February of 1942, did you believe that your native country Colombia was a neutral country?

A. No.

Q. What had transpired prior to your leaving Colombia to give you the impression or the understanding that Colombia was not a neutral country?

A. On December 7, 1941, I was in Colombia when the Pearl Harbor, and that very day the manifestations and

the parades in the streets were nothing more but of war. The following day some sort of decree or something was passed whereby we were given to understand that we were at war with Japan. The following—towards the end of the following month I came to this country by boat and I arrived about 24 days later and everybody I talked to naturally was under the impression that we were all in a common war.

Q. So that irrespective of whether or not your country Colombia was actually engaged in physical war, it was your understanding that they were not a neutral country, is that correct?

A. That's right, yes.

Q. Would you be willing to serve in the United States Army, bear arms and fight in behalf of this country, if requested today?

A. Yes.

Q. You live with your wife and two children. Where, Mr. Ceballos?

A. In New Rochelle, New York.

[fol. 72] Q. Do you own your own home?

A. Yes.

Q. Where are you now employed, if at all?

A. By a corporation under the name of Ceballos Brothers, Inc.

Q. Are you financially interested in that corporation?

A. Yes, very much so.

Q. Are you an officer?

A. I'm president of the company.

(37) Q. And where is that business located?

A. 150 Broadway.

Q. So that you have in the United States a wife, two children and your business, is that correct?

A. Correct.

Q. Approximately how much do you draw each month from your business?

A. About $800.

Q. Does your wife work?

A. No.

Q. Are your wife and children completely dependent upon you for their support and maintenance?

A. Oh, yes, completely.

Q. Has your wife any independent income of her own or independent salary of her own?

A. None, whatsoever.

Q. If you had believed that the form 301 was an application to be relieved from serving in the military service, would you have signed such a form?

A. No.

By Counsel:

No further questions.

Special Inquiry Officer to the Respondent:

Q. What official, if any, at the draft board where you were registered told you about or spoke to you about any Colombian group being organized in the United States Army?

A. No, I wouldn't

Q. Did you hear from someone in the draft board or did you hear it outside of the draft board from other persons?

A. I heard it from the draft board.

Q. Did you ask them about it or did they tell you about it voluntarily?

[fol. 73] A. The group of Colombians and other Latin fellows were big enough to come with the information gratuitously, were willing to come with the information.

Q. When you filled out the form 304, that is the personal history and statement in June 1943 you put in the answer in your own handwriting, is that correct?

A. I would imagine so.

Q. Particularly the question where you wrote in the word "do" where it (38) states that you do object to serve in the Armed Forces of the United States, the word "do" is in your own handwriting?

A. Yes.

Q. Now, if you had in mind not to genuinely to object to serve in the army entirely, did you give any thought to adding any explanation of your own as to your willingness to serve in any Colombian group or as to a reason perhaps for your so answering that you do object?

A. It was not discussed—no.

Q. You stated under questioning by your counsel that you didn't understand that the form 301 was an application to be relieved from military service, yet the form at the top in bold letters, at least the largest on the page reads: Application by Alien For Relief From Military Service. What did you think that expression meant?

A. That it was relieved from a certain group, to serve in a group—but a branch of the United States Army. What was intended at the time was that we were, by being Colombians or Latins, we were not to be subjected to discrimination or certain things that we would by ordinarily, that we would ordinarily by serving in the United States Army. Now, this also was a branch of the United States Army, but with all of us Latins together.

Q. Did you read this form 301 before you signed it?

A. I would imagine I did, it was only, it was only used, as far as I am concerned as an instrument to set up the group.

Q. At that time when you signed it, did you pay any particular attention to the statement in the form that "I understand that the making of this application to be relieved from such liability will debar me from becoming a [fol. 74] citizen of the United States"?

A. That was not taken into consideration because the fact that I would serve in the United States Army would automatically eliminate that clause.

Q. However, when you signed this you had no idea that you would serve, ever serve in the United States Army?

A. Oh, yes, we were sure that we were going to serve.

Q. The war could have ended the next day, could it not?

A. It is true, but nonetheless we were being drafted at the time. The fact that the war might have ended would not have stopped us from going because we would be, would have *have* been drafted anyway.

Q. Then am I correct in saying that you, you knew what the form said, but in your own mind you had an interpretation that it didn't fully apply to you because you would serve in some special group in any event?

A. It wasn't in my own mind, it was what was going in the draft board at the time.

Q. Now, this form which you received in the mail, you say it was typed when you received it, that is the most spaces you filled in when you (39) received it?

A. Yes.

Q. However, it is signed and sworn to before a member—rather, an employee at the local board, is that correct?

A. Yes, it is.

Special Inquiry Officer to Counsel:

Q. Is there anything further?

A. Nothing further. Just one more question.

Counsel to the Respondent:

Q. Were it not for your physical condition, would you have served in the United States Army?

A. I would have.

Q. In other words, the only reason you didn't serve was because you were rejected by the Selective Service authorities?

A. Absolutely.

[fol. 75] By Counsel:

No further question:

Special Inquiry Officer to the Respondent:

Q. What is the extent of the business which you conduct as the president of the corporation you mentioned?

A. Is in an exporters, buyers and expediters.

Q. Do you do a large business?

A. Fairly large.

Q. What would you estimate to be the value of your interest in this firm?

A. About $61,000.

Q. And you are the head of this outfit?

A. Yes, sir.

Q. If you were found to be subject to deportation, what country would you choose?

A. Colombia.

Special Inquiry Officer to Counsel:

Q. Anything further?
A. No, sir.

(40) Special Inquiry Officer to the Respondent:

Q. I am now going to state for the record my decision in your case. Do you understand?
A. Yes.

Note: At this point in the proceeding, in the presence of the alien and his representative, the Special Inquiry Officer delivered an oral statement of his decision in the case. This has been transcribed separately and is attached hereto.

Special Inquiry Officer to the Respondent:

Q. Did you understand the decision I have just made?
A. Yes.

Special Inquiry Officer to Counsel:

Q. Do you wish to be served with a copy of my decision?

A. Yes, I want to be served with a copy of your de-
[fol. 76] cision and a copy of all testimony taken subsequent to the hearing held on July 31, 1951.

— After you are served with a copy of the decision and record you will be informed of your right to take exception thereto, which will serve as an appeal to the Board of Immigration Appeals. Do you understand?

By Respondent:

Yes.

I certify the foregoing to be a true and correct transcript of my shorthand notes of the testimony taken by me in the above case.

David J. Peacker, Stenographer.

I certify that to the best of my knowledge and belief, this record is a true report of everything (41) that was stated during the course of the hearing, including oaths,

administered and the rulings on objections, except statements made off the record.

Aaron I. Maltin, Special Inquiry Officer.

[fol. 77] U. S. Department of Justice
Immigration and Naturalization Service
New York, N. Y.

File: A-7662411 New York: 0300-112629

[Title omitted]

Oral Decision of Special Inquiry Officer—Rendered July 31, 1951

In Deportation Proceedings

In behalf of respondent: Carol King, Esq., 220 Broadway, New York, N. Y. James O. Berlinger, Esq., 220 Broadway, New York, N. Y.

Charges:

Warrant: Act of 1924—failed to maintain status—transit.

Lodged: None.

Application: Suspension of Deportation—Voluntary Departure and Preexamination

Detention Status: Alien released under bond of $1,000.

Oral Decision of the Hearing Officer

Discussion as to Deportability:

This record relates to a 37-year-old male, a native of Colombia and a citizen of Mexico, who last entered the United States at New York by plane on April 2, 1951, at which time he was admitted in transit to Mexico until April 23, 1951. That entry has been verified by the presentation of Form 257A of the Foreign Service. Since he was a bona fide

[fol. 78] transit at the time of arrival, his entry was a lawful one. There is a good deal of evidence in the record which casts doubt upon the respondent's statement that it was his intention to leave the United States at the time of his arrival on April 2, 1951, but he nevertheless insists that that was his intention at that time. On April 20, 1951, he signed a sworn statement before an officer of this Service stating that he had changed his mind and decided to remain in the United States permanently. He is therefore deportable under the Immigration Act of 1924.

Upon the basis of the foregoing I make the following findings of fact:

(1) That the respondent is an alien, a native of Colombia and a citizen of Mexico;

(2) That the respondent last entered the United States at New York on April 2, 1951, by plane in transit to Mexico, being admitted until April 23, 1951;

(3) That on April 20, 1951, the respondent signed a sworn statement before an officer of the Immigration Service stating that he had decided to remain in the United States permanently.

Upon the basis of the foregoing, I make the following conclusion of law:

(1) That under Sections 14 and 15 of the Immigration Act of May 26, 1924, the respondent is subject to deportation in that he has remained in the United States after failing to maintain the exempt status, under which he was admitted, of a transit.

Discussion as to Discretionary Relief:

Respondent has made application for all three forms of discretionary relief. On the question of good moral character the respondent has presented a certificate from the [fol. 79] police of this City, the affidavits of two United States citizen witnesses who have known him for more than five years, and a statement from his present employer, all of which indicate that he has been a person of good moral character for the past five years. A report from the Federal Bureau of Investigation shows no criminal record in

this country, and the respondent has stated that he has never been arrested on any occasion in his life.

The respondent has been married on two occasions, and his first marriage ended in divorce in Mexico on June 30, 1950. His first wife and three children reside in Mexico. He is presently married to Jacqueline Michot who has appeared and testified as to her birth in the United States. They were married in New York City on January 3, 1951. In addition to her testimony the respondent's wife has presented an uncertified certificate of baptism which shows her birth in Louisiana on September 8, 1925. A certificate of birth was allegedly filed with the State Department for the issuance of a United States passport. Respondent's wife has stated that she is entirely dependent upon the respondent for support. She is at present expecting a child sometime in October 1951.

Respondent has made application for suspension of deportation and for preexamination, but in view of the fact that on August 26, 1943 the respondent signed DSS Form 301 requesting exemption from military service he is barred from acquiring United States citizenship and is thus likewise barred from discretionary relief in the nature of suspension of deportation or the issuance of a visa to him for permanent residence so that he is not eligible for preexamination.

The respondent declined at this time to accept voluntary departure although he indicated that upon the further adjudication of his claims to suspension of deportation or preexamination he would be willing to depart from the United States voluntarily. The respondent because of his business interests in this country is of course [fol. 80] extremely anxious to avoid an order of deportation, so that in any event he may in the future be able to re-visit this country, but as stated above is still desirous of prosecuting his claims before departing voluntarily.

The respondent and counsel have offered various defenses to the signing of the Form DSS 301, but it should be noted that the respondent was employed in the United States prior to August 1943 as a translator, and from his excellent command of the English language makes it quite

clear that he must have known the contents of the document he was signing. He has offered as a defense that it was his impression that this document did not bar him from citizenship, but of course the DSS Form 301 plainly so states. At the time of his signing he was a permanent resident of the United States and his request was honored because at that time Colombia was a neutral country. On November 26, 1943, Colombia became a co-belligerent in World War II, and shortly thereafter the respondent was called for service in the United States Army. He was after examination placed in Class 4-F. As further evidence of his understanding of the form which he signed, respondent personally filled out in his own handwriting DSS Form 304 in which at question No. 41 he stated: "I do object to service in the land or naval forces of the United States." The reasons given by the respondent for his so doing are of no legal efficacy. It is sufficient that the respondent understood the language of the form which is simple and states quite clearly that he would be thereafter debarred from United States citizenship.

It is alleged by the respondent and his wife that after he was admitted to the United States in transit on April 2, 1951, that she consulted a doctor because of the fact that she was pregnant, and it was mainly upon her insistence that he decided to remain in this country. The respondent's wife characterized the medical conditions [fol. 81] prevailing in Mexico as distinctly inferior to what she could obtain in the United States, but it must be noted that the respondent is apparently a person of some means and I doubt very much whether he would be unable to obtain satisfactory medical attention in Mexico City at this time. It would seem more likely that this element is only one in the respondent's desire to remain in the United States, his business interests being somewhat tied up in this country. Although there is insufficient evidence before me to decide that his presence in this country for business purposes at this time is absolutely necessary, his business in the past has taken him to all parts of the world.

In view of all of the foregoing, it does not appear

that the respondent is eligible for suspension of deportation or for preexamination, and, having declined at this time to depart voluntarily from the United States, it is my decision that he be deported from the United States pursuant to law on the charge stated in the warrant of arrest.

Aaron I. Maltin, Hearing Officer.

I certify the foregoing to be a true and correct transcript of my shorthand notes of the decision taken by me in the above case.

John Yonke, Stenographer.

I certify the foregoing to be a true and correct transcript of oral decision made by me at the hearing in this case.

Aaron I. Maltin, Hearing Officer.

AIM/jy
r. 7/31/51

[fol. 82] UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
NEW YORK, NEW YORK

New York File: 0300-112629
Central Office File: A7 662 411

[Title omitted]

ORAL DECISION OF SPECIAL INQUIRY OFFICER, RENDERED JANUARY 25, 1954

IN DEPORTATION PROCEEDINGS

In behalf of the respondent: Blanch Freedman (present), 220 Broadway, New York City, and James O. Berlinger (not present), 220 Broadway, New York City.

CHARGES

Warrant: Act of 1924, failed to maintain status—transit.
Lodged: None.

APPLICATION: Suspension of Deportation—Voluntary Departure and preexamination.

DETENTION STATUS: Released under $1000 bond.

Warrant of Arrest served April 23, 1951.

ORAL DECISION OF THE SPECIAL INQUIRY OFFICER ENTERED ON JANUARY 25, 1954.

[fol. 83] DISCUSSION: This record relates to a 40 year old married male alien, a native of Colombia and a citizen of Mexico. He last entered the United States at New York by plane on April 2, 1951, at which time he was admitted in transit to Mexico until April 23, 1951. That entry has been verified by the presentation of the form 257A of the Foreign Service. There is some evidence in the record which casts doubt upon the respondent's statement that it was his intention to leave the United States at the time of his arrival on April 2, 1951, but he nevertheless has testified and insists that it was

his intention at that time to so depart. On April 20, 1951 he signed a sworn statement before an officer of this Service stating that he had then changed his mind and decided to remain here. It is found that he was a bona fide transit at the time of his arrival and that his entry was a lawful one. Having remained beyond the period for which he was admitted, however, he is now amenable to deportation under the Immigration Act of 1924.

The respondent has made application for Suspension of Deportation and for Voluntary Departure and Preexamination. He has previously presented adequate evidence of good moral character, and it is found that he has satisfactorily established that he has been a person of good moral character for the past five years and is statutorily eligible for the privilege of Voluntary Departure.

The respondent has been married on two occasions. His first marriage ended in divorce in Mexico on June 30, 1950. His first wife and three children reside there. He is presently married to a native born citizen of the United States, and he has two children born in this country with his second wife. They were married to each other in New York City on January 3, 1951. She and the two children are completely dependent upon him for support, and it is adequately established that his deportation would cause serious economic detriment to them. [fol. 84] The bar to his being granted Suspension of Deportation or Preexamination so that he could obtain a visa is the fact that he, on August 26, 1943, signed DSS form 301 "Application by Alien for Relief from Military Service." This request makes him ineligible to United States citizenship, and he is, therefore, ineligible for the discretionary relief of Suspension of Deportation or Preexamination, as he will not be able to obtain a visa.

The respondent is engaged in the importing and exporting business, from which he draws approximately $10,000 a year. His interest in this firm exceeds $60,000. He is the president of the concern and from his general demeanor and business standing I would assume

that he is a person of intelligence and ability to understand the nature of documents, even though of a somewhat complex nature. There is no claim by him that he was not aware of the contents of the documents he signed, either the DDS form 301 or form 304. However, he has offered as a defense that he had a different impression as to the ultimate effect of these documents. He did not believe that they barred him from citizenship, as it was his intention to serve in a group, which he understood was to be formed consisting of Latin Americans residing in the United States. There is no evidence before me to support the respondent's statements that the draft board informed him that such a group was being formed. However, even if this was so, he made no attempt either on the form 304 or on the form 301 to qualify his answers and to indicate what were his mental reservations, if they existed. At the time of his signing these forms, he was a permanent resident of the United States and his request was honored because at that time Colombia was a neutral country. The respondent has offered some evidence to question the fact of whether or not Colombia was a neutral country at the time of the execution of the form 301. It is clear from what is now [fol. 85] Exhibit 16 that it was not until November 26, 1943 that Colombia became a co-belligerent in World War II. Shortly after this, in about January 1944, the respondent was called for service in the United States Army, at which time he states he was willing to serve, but he was placed in class 4F and was rejected for military service. Since under the Selective Training and Service Act of 1940 Colombia was regarded as a neutral country until November 26, 1943, even though the respondent questions this fact, as long as he has received exemption from military service as a result of the Selective Service's interpretation that Colombia was a neutral, he is now in effect estopped from denying the neutrality of Colombia at the time of his application on form DSS 301. See in the Matter of D————————, A-3203582, decided by the Board June 23, 1953 (Interim Decision No. 463). It has been held that persons who have actually served in the military service of the United

States after signing a form 301 may thereby, under certain circumstances, not be barred from United States citizenship. However, it has also been held that where persons, through no fault of their own, have been classified 4F and did not serve in the United States Army, they are nevertheless bound fully by the form DSS 301 and are still barred from citizenship.

Although there is no specific request before me for the relief of Voluntary Departure alone, without the additional privilege of Preexamination, this appears to be based upon the many ties that the respondent has in the United States and his extensive business interest here which makes him extremely reluctant to depart unless he is found to be ineligible for any relief. Despite the absence of a specific request for Voluntary Departure, in view of the fact that he is pursuing a course which he believes to be legally tenable and apparently believes that he should be granted relief, this privilege will be granted to him.

In the event of deportation he has chosen Colombia.

Upon the basis of the foregoing, I make the following [fol. 86] Findings of Fact:

(1) That the respondent is an alien, a native of Colombia and a citizen of Mexico;

(2) That the respondent last entered the United States at New York on April 2, 1951 by plane in transit to Mexico, being admitted until April 23, 1951;

(3) That the respondent on April 20, 1951 signed a sworn statement before an officer of the Immigration Service stating that he had decided at that time to remain in the United States permanently;

(4) That there is no indication that respondent ever obtained an extension of his temporary stay beyond April 1951.

Upon the basis of the foregoing Findings of Fact, I make the following Conclusion of Law:

(1) That under Sections 14 and 15 of the Immigration Act of May 26, 1924, the respondent is sub-

ject to deportation, in that, he has remained in the United States after failing to maintain the exempt status under which he was admitted of a transit.

Order: It is ordered that the alien be granted Voluntary Departure at his own expense, in lieu of deportation within such period of time or authorized extensions thereof and under such conditions as the District Director or Officer in Charge, having administrative jurisdiction of the office in which the case is pending, shall direct.

It is further ordered that if the alien fails to depart when and as required, the privilege of Voluntary Departure shall be withdrawn without further notice or proceedings and the alien deported from the United States in the manner provided by law on the charge contained in the warrant of arrest.

Aaron I. Maltin, Special Inquiry Officer.

[fol. 87] U. S. DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

October 19, 1954

File: 0300-112629—New York (A-7662441)

[Title omitted]

DECISION OF BOARD OF IMMIGRATION APPEALS, DATED OCTOBER 19, 1954

IN DEPORTATION PROCEEDINGS

In behalf of respondent: Joseph Freehill, Esquire, 1701 K Street, N. W., Washington 6, D. C.

(Heard: May 20, 1954)

(Joseph Fanelli, Esquire, also present)

CHARGES

Warrant: Act of 1924, failed to maintain status—transit.

Lodged: None.

APPLICATION: Suspension of deportation or voluntary departure and preexamination

DETENTION STATUS: Released under bond

Appeal from the order of the special inquiry officer finding respondent deportable on the ground stated above, denying his application for suspension of deportation on the ground that he was statutorily ineligible for such relief, and granting voluntary departure.

Respondent is a 40-year-old married male alien. He last entered the United States in 1951 when he was admitted in transit to Mexico. He remained beyond the [fol. 88] period for which he was admitted and is clearly deportable on the charge contained in the warrant of arrest. He was born in Colombia and was a Colombian national until sometime after August 26, 1943 when he filed DSS Form 301. In a manner and at a time

not specifically disclosed by the record, he became a citizen of Mexico. (At oral argument counsel stated his belief that acquisition of Mexican nationality occurred in 1950.)

The issue presented to us concerns his eligibility for suspension of deportation. Application for such relief was timely submitted under the provisions of the Immigration Act of 1917, as amended. The special inquiry officer concluded that respondent's deportation would result in a serious economic detriment to his native-born citizen wife and two native-born citizen children, but that the respondent could not be given suspension of deportation because he was ineligible to naturalization and one so ineligible is expressly barred from the grant of suspension of deportation (Section 19(c), Act of February 5, 1917, as amended). The special inquiry officer found that the respondent was ineligible to naturalization because on August 26, 1943, at a time when he was a permanent resident of the United States, respondent signed Form DSS 301 (Application by an Alien for Relief from Military Service). Under the provisions of Section 3(a) of the Selective Service Act of 1940, a person who filed such a form was relieved from service but was permanently barred from becoming a citizen of the United States. On this issue, we reach the same conclusion as did the special inquiry officer.

In brief, respondent's contentions are that in executing Form DSS 301, he never intended to ask for relief from service in the armed forces; that his act was the result of inaccurate representation by the Selective Service Board as to its effect; that he was not a citizen of a neutral nation at the time of filing; and that his action was ineffective because he did not receive any benefits by reason of it.

[fol. 89] The facts follow. Respondent was lawfully admitted to the United States for permanent residence in February 1942. In May he registered under the Selective Training and Service Act as required. On June 16, 1943, he executed Form DSS 304 which is entitled "Alien's Personal History and Statement". In his own handwriting he completed the question under Item 41

of this form to read as follows: "I do object to service in the land and naval forces in the United States."

Within two months thereafter, he received Form DSS 301 which he executed under oath on August 26, 1943 before a Selective Service official. The form is entitled "Application by an Alien for Relief from Military Service". As it applies to the respondent, a non-declarant alien, only two paragraphs in the form are relevant. The first paragraph is descriptive. The second paragraph follows:

> I do hereby make application to be relieved from liability for training and service in the land or naval forces of the United States, under the Selective Training and Service Act of 1940, as amended, in accordance with the act of Congress, approved December 20, 1941. I understand that the making of this application to be relieved from such liability will debar me from becoming a citizen of the United States. I have not filed a declaration of intention to become a citizen of the United States.

On November 26, 1943 Colombia became a co-belligerent. In January 1944, respondent was called for induction. He was rejected because of a physical condition.

Other than respondent's bare statement that he completed Form DSS 301 solely in reliance upon representations made by an unnamed member or employee of the Selective Service Board as to the purpose and function [fol. 90] of Form DSS 301, and Form DSS 304, there is nothing in the record to support his claim. The testimony of an individual may be substantial proof even though it is self-serving; however, we conclude that the respondent's testimony in regard to the circumstances surrounding the signing of the Forms DSS 301 and DSS 304 is not substantial evidence in support of his claim.

Respondent states that prior to the completion of Forms DSS 301 and DSS 304, he had heard the formation of a United States army group composed of Latin Americans was under consideration; he approached the draft board for information as to the manner in which

he could be assigned for service to this group; and that he was officially informed by the draft board to complete Form DSS 304 to show he did not desire to serve in the armed forces of the United States if he desired consideration for assignment to the unit in question. His testimony is that in a sincere desire to serve, and relying upon the instructions of the Selective Service employee, he completed Form DSS 304 to show that he did not desire to serve in the armed forces. His statement is that to him this action meant only that he did not desire to serve in regular units of the armed forces, if he could be assigned to a Latin American unit in the United States Army.

It is further claimed that within two months thereafter, without his solicitation, there came to him Form DSS 301 partially completed. He took this form to the Selective Service Board and informed them of his desire to serve in a Latin American unit of the United States Army. He was informed that to obtain assignment to such a unit, he must complete Form DSS 301. Relying upon this assurance by the draft officials, he executed the form, not with a desire to escape service, but to serve in a special unit if that were the will of the draft board.

[fol. 91] Respondent does not deny that he knew the contents of the forms he signed, but states that he interpreted the matter therein in light of what he had been told by the draft board, to mean that he desired consideration for assignment to a Latin American unit in the United States Army.

We find great difficulty in accepting respondent's claim that in completing Form DSS 301, he was without any idea that he would be barred from citizenship and that his failure to realize the significance of his act was due to assurances he received from the draft board.

We have been informed of no regulation or instruction or practice which authorized a Selective Service employee to inform a registrant that a negative answer to question 41 on Form DSS 304 was to be used as a means for determining eligibility for service in a particular branch of the United States Armed Forces. In

fact, the regulations then in existence instructed Selective Service employees to refer registrants who asked for advice or assistance to an advisory board (32 CFR 621.6, Cumulative Supplement). We know of no regulation which authorized the board to accept Form DSS 301 from any registrant other than an alien who met the following two conditions: (1) that he was a neutral alien; and (2) that he did not desire to serve in the land or naval forces of the United States (32 CFR 622.43(2), 1943 Supp.). To now hold after a lapse of 11 years and in the absenuce of testimony from the clerk or any member of the board that Forms DSS 301 and DSS 304 were executed by the respondent because of instructions by the draft board in violation of regulations "would constitute an arbitrary ruling upon the methods pursued by the board in discharging its difficult functions, which is a position which could be justified only under very unusual circumstances" (*Petition of Miranda*, 111 F. Supp. 481, N. Y.). Certainly "very unusual circumstances" do not exist herein. Respondent's familiarity [fol. 92] with the English language cannot be questioned. Prior to the date he completed the forms in question, he was employed in the United States as a translator. He has capably conducted himself in the business world. He has been the managing director of an export firm and is now the head of such a firm. In 1950, he had an investment of $190,000 in a business. His present investment in his business is in excess of $60,000. A person presently associated with him in business considers him a very capable and active individual and a definite asset to the company in a senior executive capacity.

In view of respondent's knowledge of the English language, and the progress he has made in the business world, and in view of the simplicity and clarity of the statements in the forms in question; in view of the fact that he claims to have had at least three separate discussions with the draft board over a period of 13 months about service in the armed forces; and in view of the fact that the documents he signed were in his possession for some days for private perusal, it would be naïve to conclude that he had signed the documents objecting

to service in the armed forces and asking for relief "from liability for training and service in the land or naval forces of the United States" in a sincere desire to serve in the Armed Forces of the United States—the reason he now advances.

Furthermore, we find several inconsistencies in respondent's testimony from which we conclude that his recollection of events cannot be relied upon. He now contends that his action in signing the Form DSS 301 was based upon information furnished him by the draft board that he would thereby obtain a determination upon his desire to serve in a Latin American unit which was being formed in *the Armed Forces of the United States.* This differs from his recollection at his hearing on July 31, 1951 at which time while represented by two attorneys he testified as follows in response to a question [fol. 93] from his counsel as to his recollection of the circumstances under which he signed Form DSS 301:

> I went to my draft board and was presented with Form 301 for signature. At that time it was my understanding that it was a temporary deferment pending indication from the same draft board as to what would be the best choice for me as to whether I wanted to serve in the Colombian Army *or* the United States Army. I had several conversations with several Colombian boys who found themselves in the same position that I was, we felt that it was better for us *to serve in the Colombian Army* fighting for a common cause *rather than in the United States Army* where we might be treated as tropical boys. In other words, we felt that language, religion and idiosyncracy was to be found in a group of boys from the same country. (p. 8; emphasis added).

On the same page appears respondent's further answer:

> Because as I stated before when I signed Form 301 I understood it to be a choice between the Colombian Army and the United States Army (See also p. 12).

An affidavit executed by respondent on April 20, 1951 in the presence of his attorney contain- the following statement:

> Shortly after my arrival in the United States I signed a Form 301 because I preferred to return to Colombia and enter the army rather than to go into the United States Army at that time. However, by signing this form I thought it gave me the right to go into the Colombian Army rather than the new U.S. Army. * * * (Ex. 2)

[fol. 94] Another example of a discrepancy. Respondent now claims that he filed Form DSS 301 on the advice and at the instruction of the *draft board*. His recollection at the 1951 hearing was different. The following question and answer appear:

> Q. [By Hearing Officer] * * * However, Colombia was not at war with Germany or Japan until November 26, 1943, when a state of belligerency was declared, so that I fail to follow your statement that you wanted to join the Colombian Army perhaps in preference to the United States Army in the common cause when there was no common cause at the time you requested deferment.
>
> A. [By respondent] The boys that were studying here at that time, that were going to college in this country at that time, and I discussed the situation according to what we understood it to be. If we went into the United States Army we felt that we would not have the same opportunity of being treated as fair as a native of the United States, and not only because we were aliens but also because being used to tropical climates that we might be sent to places that were extremely full of tropical or other diseases. Therefore, *not being able to ask anybody in the draft board about what was the best procedure* to follow due to the fact that at time millions of boys were being drafted and the forms were being handed to you to be filled *if you wanted to fill them*, then I believe that it was our idea at that time that

we were going to be given an opportunity to fight in a squadron that either existed or was going to be formed or originating from Latin America. I further understood that if we were going to join such squadron, the same as the 201st from Mexico, that we had to go to our country. (p. 11, emphasis added.)

[fol. 95] Further, on the weight to be given to respondent's present self-serving declarations, we note that he has signed an affidavit before the American Consul in Mexico City *denying that he had signed Form DSS 301* (p. 8). His explanation was that he thought the effect of the signing of the Form 301 was a temporary one and that it had been dissipated by subsequent events. At the least, this explanation reveals such a selective attitude by the respondent toward facts that his candidness must be questioned. The discrepancies in the testimony and the subjective approach to factual matters do not establish that the respondent is such a candid individual or that he has the reliable recollection that substantial weight should be given to is self-serving explanations of the circumstances surrounding the execution of Form DSS 301.

Counsel finds significance in the fact that respondent did not ask the draft board to send him the Form DSS 301. The inference is apparently drawn from this that respondent's testimony to the effect that the draft board wanted him to sign the form to get a ruling on his desire to join the Latin American contingent in the United States Armed Forces is corroborated. We find no significance from the fact. There is no showing that the draft board sent the form to the respondent for the purpose claimed by counsel. There is nothing on this simple one page form which can be pointed to as indicating that the person executing it was making application for service in the land or naval forces of the United States in *any* capacity. Furthermore, whether solicited or not, respondent was under no obligation to complete the form if he did not desire to do so. His 1951 testimony reveals that he knew it was completely up to the

individual to submit the form or not. Moreover, the likelihood is that the form was sent to respondent as a direct result of his statement two months previously that he did not wish to serve in the Armed Forces of the United States to help him effectuate his wish. [fol. 96] It is urged that respondent did not consider himself a neutral alien at the time he signed and therefore did not believe that the bar to citizenship applied to him. We are more inclined to the view that respondent signed the form because he was a neutral alien and so considered himself. This is the obvious conclusion from the facts.

We conclude that respondent fully understood the legal consequences of his action and that he was not duly influenced by other considerations. We find the respondent knowingly and intelligently waived his right to apply for citizenship. The cases cited by counsel concerning situations where the Form DSS 301 was signed under circumstances preventing an intelligent waiver therefore have no application to the present situation.

Respondent argues that the forfeiture of the right to future citizenship by reason of signing Form DSS 301 was conditioned upon the obtaining of relief from liability from military service and training. It is alleged that he was never exempted from training and service as shown by the fact that he was called for induction in January 1944. We note in passing, but without being influenced by the fact, that this contention seems inconsistent with the previous position that respondent never applied for exemption from service. We do not find the argument persuasive. First, there is no competent evidence to establish that respondent was not reclassified in accordance with Selective Service regulations applicable to his case. Colombia did not become a co-belligerent until November 26, 1943. From the time respondent signed his claim for exemption in August 1943, and during all the time Colombia was a neutral, he was not called upon to serve. Only after Colombia became a belligerent was he called upon for induction. The fact that he was called for induction so quickly after Colombia became a belligerent and was not troubled from August

26, 1943, the date he signed the Form DSS 301, for the [fol. 97] entire period that Colombia remained a neutral is some evidence that he received the exemption he applied for. In any event, it is our belief that *the act of filing* the Form DSS 301 by the respondent who at the time was a neutral alien legally subject to military service, created the bar to naturalization. The clear language of the statute requires this conclusion. It states that certain persons may make application to be relieved, but any person "who *makes* such application *shall thereafter* be debarred" from citizenship (emphasis added, 50 USCA App. 303(a), 1944 Ed.). The statute does not require that any act follow the filing of the application to make the neutral alien exempt and the regulations to implement the law do not so provide (32 CFR 622.43, 1943 Supp.).

While this precise issue was not involved in the cases which follow, the language used by the courts appear to support our position. In *Machado* v. *McGrath*, 193 F. 2d 706, C.A. D.C., certiorari denied 342 U.S. 948, the court stated that "any person who *asks* for this relief (from service) is thereafter, debarred from becoming a citizen of the United States." In *Navarro* v. *Landon*, 108 F. Supp. 922, S.D. Calif., the court stated concerning an alien who had filed Form DSS 301 that *"his application* created the bar against naturalization." In *McGrath* v. *Kristensen*, 340 U.S. 162, 95 L. ed., 173, the court stated concerning the filing of a Form DSS 301 by a person who is not under a legal obligation to serve that "By the terms of the statute, that bar only comes into existence when an alien resident liable for service *asks* to be relieved." (Emphasis added in all cases; See also *Benzian* v. *Godwin*, 168 F. 2d 952, C.A. 2, certiorari denied 335 U.S. 886; *Petition of Dweck*, 106 F. Supp. 169, E.D. N. Y.; and *In re Molo*, 107 F. Supp, 137, 139, S.D. N.Y.).

In re Siem, 284 Fed. 868 (1922), affirmed 299 Fed. 582 (C.A. 9); and *In re Gustarson*, 300 Fed. 251, S.D. Calif. [fol. 98] (1924), cited by counsel, do not appear to be pertinent. Both were naturalization cases in which the issue was whether the fact that the aliens had filed claims

for exemption from service evidenced a lack of attachment to the principles of the constitution. The bar to naturalization upon the surrender of a declaration of intention appears to have been first added to the law by the Act of July 9, 1918. In *Siem* it appears that application for exemption was made prior to the Act of July 9, 1918. In any event, the case did not involve the statutory imposition of the penalty of eligibility, but only whether the exemption application based on alienage manifested lack of attachment to the principles of the constitution. In the *Gustavson* case the facts are not clear; there is no clear showing that exemption was claimed under the Act of July 9, 1918.

Counsel contends that Colombia was not a neutral nation at the time respondent executed Form DSS 301. The record clearly establishes that while the sympathies of Colombia were with the Allies from the time of Pearl Harbor, Colombia did not declare war until November 26, 1943, and until the date of the declaration of war, she was officially regarded by the Department of State and the Selective Service Board as a neutral nation. The contention must be dismissed.

Respondent is ineligible for suspension of deportation. Since respondent will be unable to obtain a visa because he is ineligible to enter the United States, the relief of preexamination cannot be given him. He has been granted voluntary departure by the special inquiry officer. This appears to be the maximum relief to which respondent is entitled. The appeal will be dismissed.

Order: It is ordered that the appeal be and the same is hereby dismissed.

Chairman.

[fol. 99] U. S. DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

[Title omitted]

DECISION OF BOARD OF IMMIGRATION APPEALS ON MOTION FOR RECONSIDERATION—FEBRUARY 17, 1955

File: A-7662411—New York (0300/112629)

IN DEPORTATION PROCEEDINGS

In behalf of respondent: Joseph Freehill, Esquire, 1701 K Street, N. W., Washington 6, D. C.

DEPORTABLE: Act of 1924—Failed to maintain status—Transit

MOTION FOR RECONSIDERATION

On October 19, 1954, this Board entered an order dismissing the respondent's appeal from the order of the special inquiry officer finding him deportable on the ground stated above. We, as did the special inquiry officer, denied the alien's application for preexamination and suspension of deportation. The application for suspension of deportation was considered under the Act of 1917. We decided that the respondent was legally barred from re-[fol. 100] ceiving suspension of deportation because he was not eligible for naturalization. We stated ineligibility for naturalization resulted because he had requested relief from military service as a neutral alien.

We found that the alien was a person of weak credibility for reasons fully set forth. One of these reasons was the fact that we found a conflict between the alien's present self-serving testimony and his past admissions. Counsel contends that the testimony given by respondent was not conflicting, but is consistent. We have carefully examined this contention and find no reason to change or add to our previous statement.

Other arguments are based upon the claim that the record does not clearly establish when Colombia ceased to be a neutral nation. We found that date to be Novem-

ber 26, 1943, the date the Selective Service Board also considered itself bound by. Counsel argues that Colombia ceased to be a neutral shortly after Pearl Harbor. He relies upon a letter dated March 5, 1953 from the Colombian Embassy at Washington, D. C. to the effect that a state of war between Colombia and the Axis was decreed on December 22, 1951. The decree of December 22, 1941 is attached to this statement. It reveals not a declaration of war, but merely that the Government of Colombia stated it would consider the United States as non-belligerent so that laws relating to the treatments of nationals of the United States and its vessels of trade and war would be applied to the United States as though the United States were in fact a neutral nation (Ex. 15).

Counsel also relies upon a letter dated October 24, 1951 from the Colombian Embassy at Washington, D. C. This letter states that by decree of November 16, 1942, the Government of Colombia declared a state of belligerency with the Axis powers (Ex. 13). A copy of that decree was not made a part of the record.

[fol. 101] While the two letters referred to raise a question as to the date Colombia became at war with the Axis powers and was so recognized by the Government of the United States, we believe the matter is settled by the last communication from the Colombian Embassy. Under date of September 2, 1953, the Embassy revealed that the state of belligerency occurred on November 26, 1943. A copy of the official decree relating to that occurrence is attached (Ex. 16). The fact that some considerable time after November 16, 1942, the latest date relied upon by counsel, the Colombian executive and legislature acted to declare war is the strongest evidence that the previous statements relied upon by counsel did not result in abandonment of the status as a neutral. Moreover, November 26, 1943 is also the date used by the Selective Service Board which was then charged with the responsibility of permitting only aliens of "a country which is neither a co-belligerent country nor an enemy country" to make application for exemption from service as a neutral alien (32 CFR 601.21(c); 622.43(b) (Cum. Supp. 1944)). We be-

lieve the record establishes that Colombia became a co-belligerent on November 26, 1943.

It appears to be counsel's argument that even if it be assumed that Colombia became a co-belligerent only after the alien had signed his request for exemption, he is still not barred from naturalization because the record establishes that he made such application acting in the belief that he was not a neutral, but a co-belligerent seeking a ruling as to whether he could be assigned to a Latin-American group in the regular American Army instead of a normal group. As we stated in our previous order, it is reasonable to assume from the evidence of record that Colombia's sympathies were with the Allies from the time of Pearl Harbor. Nevertheless, we concluded, after a very careful consideration of the entire record, that the respondent knew he was a national of a neutral [fol. 102] nation and that he signed the request for exemption with knowledge of its consequences. After again carefully considering counsel's contention, we see no reason to change our conclusion.

The argument that the respondent obtained no benefits from the filing of the DSS Form 301 and therefore his election never became effective, has been previously fully considered. We might further add that whether or not the alien was reclassified, it is clear that after he had filed his application, he could not have been legally inducted while Colombia remained a neutral (32 CFR 622.43(b), supra). The motion for reconsideration will be denied.

Order: It is ordered that the motion for reconsideration be and the same is hereby denied.

Chairman.

[fol. 103] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 130—October Term, 1955.

Docket No. 23721

LUIS ALVARO CEBALLOS (Y ARBOLEDA), Plaintiff-Appellant,

v.

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization at the Port of New York, Defendant-Appellee.

OPINION—FEB. 6, 1956

Before: MEDINA, HINCKS and WATERMAN, *Circuit Judges.*

Appeal from a decision and order of the District Court of the United States for the Southern District of New York. Irving R. Kaufman, *Judge.*

Plaintiff appeals from the District Court's dismissal of his complaint for failure to join an indispensable party. Opinion reported in 130 F. Supp. 30. Affirmed.

[fol. 104] Blanch Freedman and Gloria Agrin, New York City, for plaintiff-appellant.

Paul W. Williams, New York City (Harold J. Raby and Maurice N. Nessen, New York City, of counsel), for defendant-appellee.

MEDINA, *Circuit Judge:*

Plaintiff, an alien, seeks *inter alia* a declaratory judgment that he is not ineligible for naturalization under 8 U. S. C. A. § 155(c) (1950 Cum. Pocket Part) and, in effect, a stay of deportation until the Attorney General exercises his discretion with respect to plaintiff's application for suspension of deportation. The complaint, brought against the District Director of Immigration, was dismissed below on the procedural ground that the Attorney General or the Commissioner of Immigration and Naturalization was an indispensable party.

Judge Kaufman followed and elaborated upon the dis-

tinction we made in *Pedreiro* v. *Shaughnessy*, 2 Cir., 213 F. 2d 768, aff'd, 349 U. S. 48, between a challenge to deportability, as in *Pedriero*, and a claim that, notwithstanding deportability, the Attorney General should exercise his discretion in favor of the issuance of an order suspending deportation, as in *Vaz* v. *Shaughnessy*, 2 Cir., 208 F. 2d 70 and in the case now before us. Although the question is not free from doubt, we shall follow our reasoning in *Vaz* and more fully stated in the opinion below. While the Supreme Court may decide that the distinction no longer holds, we do not think this is to be spelled out of Mr. Justice Black's opinion in *Pedreiro*.

In any event, the decision below must be affirmed because, as a matter of law, plaintiff is not entitled to the relief he requests. For 8 U. S. C. A. § 155(c) (1950 [fol. 105] Pocket Part) permits his application for suspension of deportation to be considered only if he is eligible for citizenship. Plaintiff, however, admits that he signed a DSS Form 301: Application by Alien for Relief from Military Service. Plaintiff heard nothing further from his Draft Board until his country of citizenship became a belligerent and he was, consequently, no longer entitled to claim exemption as a neutral alien. Whether this was cause or coincidence, as the defendant and plaintiff respectively contend, is not material. Section 303(a) of Title 50 of the United States Code, Appendix provides that an alien who "has made application" to be relieved from military service "shall thereafter be debarred from becoming a citizen of the United States," and plaintiff made such an application and hence is not eligible for an order suspending deportation.

Affirmed.

[fol. 106-107] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LUIS ALVARO CEBALLOS (Y ARBOLEDA), Plaintiff-Appellant,

v.

EDWARD J. SHAUGHNESSY, District Director, etc., Defendant-Appellee.

JUDGMENT—FEB. 6, 1956

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

(s) A. Daniel Fusaro, Clerk.

[fol. 108] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 109] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI.—FILED JUNE 11, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.